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Anticipatory Collective Self-Defense in the Charter Era: What the Treaties Have Said

George K. Walker*

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A debate continues on whether anticipatory self-defense is permitted in the era of the U.N. Charter.¹ Two recent commentators say that states need

1. Compare, e.g., *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 4, 347 (June 27) (Schwebel, J., dissenting) (Nicaragua Case); STANIMIR A. ALEXANDROV, *SELF-DEFENSE AGAINST THE USE OF FORCE IN INTERNATIONAL LAW* 296 (1996); D.W. BOWETT, *SELF-DEFENSE IN INTERNATIONAL LAW* 187-93 (1958); BENGT BROMS, *THE DEFINITION OF AGGRESSION IN THE UNITED NATIONS* 127 (1968); 1 OPPENHEIM'S *INTERNATIONAL LAW* § 127 (Robert Jennings & Arthur Watts eds., 9th ed. 1992); HANS KELSEN, *COLLECTIVE SECURITY UNDER INTERNATIONAL LAW* 27 (Nav. War C. Int'l L. Stud., v. 49, 1956); TIMOTHY L.H. MCCORMACK, *SELF-DEFENSE IN INTERNATIONAL LAW: THE ISRAELI RAID ON THE IRAQI NUCLEAR REACTOR* 122-44, 238-39, 253-84, 302 (1996); MYRES S. MCDUGAL & FLORENTINO FELICIANO, *LAW AND MINIMUM WORLD PUBLIC ORDER* 232-41 (1961); OSCAR SCHACHTER, *INTERNATIONAL LAW IN THEORY AND PRACTICE* 152-55 (1991); JULIUS STONE, *OF LAW AND NATIONS: BETWEEN POWER POLITICS AND HUMAN HOPES* 3 (1974); ANN VAN WYNNEN THOMAS & A.J. THOMAS, *THE CONCEPT OF AGGRESSION IN INTERNATIONAL LAW* 127 (1972); George Bunn, *International Law and the Use of Force in Peacetime: Do U.S. Ships Have to Take the First Hit?*, 39 NAV. WAR C. REV. 69-70 (May-June 1986); Christopher Greenwood, *Remarks, in Panel, Neutrality, The Rights of Shipping and the Use of Force in the Persian Gulf War (Part I)*, 1988 PROC. AM. SOC'Y INT'L L. 158, 160-61 (1990); David K. Linnan, *Self-Defense, Necessity and U.N. Collective Security: United States and Other Views*, 1991 DUKE J. COMP. & INT'L L. 57, 65-84, 122; A.V. Lowe, *The Commander's Handbook on the Law of Naval Operations and the Contemporary Law of the Sea, in THE LAW OF NAVAL OPERATIONS* 109, 127-30 (Nav. War C. Int'l L. Stud., v. 64, Horace B. Robertson ed., 1991); James McHugh, *Forcible Self-Help in International Law*, 25 NAV. WAR C. REV. 61 (No. 2, 1972); Rein Mullerson & David J. Scheffer, *Legal Regulation of the Use of Force, in BEYOND CONFRONTATION: INTERNATIONAL LAW FOR THE POST-COLD WAR ERA* 93, 109-14 (Lori Fisler Damrosch et al. ed., 1995); John F. Murphy, *Commentary on Intervention to Combat Terrorism and Drug Trafficking, in LORI FISLER DAMROSCH & DAVID J. SCHEFFER, LAW AND FORCE IN THE NEW INTERNATIONAL ORDER* 241 (1991); W. Michael Reisman, *Allocating Competences to Use Coercion in the Post-Cold War World: Practices, Conditions, and Prospects, in DAMROSCH & SCHEFFER, supra*, at 25, 45; Horace B. Robertson, Jr., *Contemporary International Law: Relevant to Today's World?*, 45 NAV. WAR C. REV. 89, 101 (1992); Robert F. Turner, *State Sovereignty, International Law, and the Use of Force in Countering Low-Intensity Aggression in the Modern World, in LEGAL AND MORAL CONSTRAINTS ON LOW-INTENSITY CONFLICT* 43, 62-80 (Nav. War C. Int'l L. Stud., v. 67, Alberto Coll et al. eds., 1995); and C.H.M. Waldock, *The Regulation of the Use of Force by Individual States in International Law*, 81 R.C.A.D.I. 451, 496-99 (1952) (anticipatory self-defense permissible, as long as principles of necessity and proportionality observed), with, e.g., IAN BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 257-61, 275-78, 366-67 (1963); YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENSE* 182-87, 190 (2d ed. 1994); LOUIS HENKIN, *INTERNATIONAL LAW: POLITICS AND VALUES* 121-22 (1995); PHILIP C. JESSUP, *A MODERN LAW OF NATIONS* 166-67 (1948); D.P. O'CONNELL, *THE INFLUENCE OF LAW ON SEA POWER* 83, 171 (1979); 2 LASSA OPPENHEIM, *INTERNATIONAL LAW* § 52aa, at 156 (Hersch Lauterpacht ed., 7th ed. 1952); AHMED M. RIFAAT, *INTERNATIONAL AGGRESSION* 126 (1974); BRUNO SIMMA, *THE CHARTER OF THE UNITED NATIONS: A COMMENTARY* 675-76 (1994); Tom Farer, *Law and War, in 3 THE FUTURE OF THE INTERNATIONAL LEGAL ORDER* 30, 36-37 (Cyril E. Black & Richard A. Falk eds., 1971); Yuri M. Kolosov, *Limiting the Use of Force: Self-Defense, Terrorism, and Drug Trafficking, in LAW AND FORCE, supra*, at 233, 235; Josef L. Kunz, *Individual and Collective Self-Defense in Article 51 of the Charter of the United Nations*, 41 AM. J. INT'L L. 872, 878 (1947); Rainer Lagoni, *Neutrality, the Rights of Shipping, supra*, at 161, 162, and Robert W. Tucker, *The Interpretation of War Under Present International Law*, 4 INT'L L.Q. 11, 29-30 (1951). See also W. Tucker, *Reprisals and Self-Defense: The Customary Law*, 66 AM. J. INT'L L. 586 (1951) (states may respond only after being attacked). The USSR generally subscribed to the restrictive view. Kolosov, *supra*, at 234; Mullerson & Scheffer, *supra*, at 107. U.S. policy is that states may respond in anticipatory self-defense, subject to necessity and proportionality principles. NAVAL WAR COLLEGE OCEANS LAW & POLICY DEPARTMENT, *ANNOTATED SUPPLEMENT TO THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERA-*

not await the first blow but may react in self-defense, provided that principles of necessity and proportionality are observed.² They differ, however, on when states may claim anticipatory self-defense.³ Such a disagreement is not surprising, given that some commentators seem to change views,⁴ while others take no clear position at all.⁵

Most anticipatory self-defense claims since World War II have been asserted by states responding unilaterally to another country's actions. It is claims of this nature that should be expected in the future.⁶ Article 51 of the U.N. Charter declares that "Nothing in the . . . Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a [U.N.] Member . . . until the Security Council has taken measures necessary to maintain international peace and security."⁷ This article analyzes an alternative to individual self-defense, that is, collective security pursuant to a treaty.

After examining nineteenth and twentieth century international agreements, this Article will analyze the scope of collective self-defense in Charter era treaties. The question arises whether the agreements include a right of anticipatory collective self-defense paralleling the state's right to claim individual anticipatory self-defense. Moreover, if there is a right of anticipatory collective self-defense, what is the scope of that right, and what are the limitations on it?

TIONS: NWP 1-14M/MCWP 5-2.1/COMDTPUB P5800.1 ¶¶ 4.3.2-4.3.2.1 (1997) [hereinafter NWP 1-14]. *Nicar. v. U.S.*, 1986 I.C.J. 4 (June 27) at 103, declined to address the issue. NWP 1-14, *supra*, replaces UNITED STATES DEPARTMENT OF THE NAVY, ANNOTATED SUPPLEMENT TO THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS: NWP 9A/FMFM 1-10 (1987) [hereinafter NWP 9A].

2. See ALEXANDROV, *supra* note 1, at 296; McCORMACK, *supra* note 1, at 122-44, 238-39, 253-84, 302.

3. Compare ALEXANDROV, *supra* note 1, at 159-65 (1981 Israeli air raid on Iraqi nuclear reactor not anticipatory self-defense), with McCORMACK, *supra* note 1, at 285-302 (raid within limits of anticipatory self-defense).

4. Compare, e.g., 1 D.P. O'CONNELL, INTERNATIONAL LAW 25 (1970) (favoring anticipatory self-defense), with O'CONNELL, *supra* note 1, at 83, 171 (then-current naval thinking was leaning toward the reactive view). O'Connell is equivocal on the point. See 2 D.P. O'CONNELL, THE INTERNATIONAL LAW OF THE SEA 795, 797, 803-08, 1044-45, 1095-1101 (I.A. Shearer ed. 1984). Compare Kelsen, *supra* note 1, at 27 with HANS Kelsen, THE LAW OF THE UNITED NATIONS 791-93 (1950). Where possible, I have listed commentators' views based on their last published position.

5. Cf., e.g., *Addendum to the Eighth Report on State Responsibility*, 1980 2(1) Y.B. INT'L L. COMM'N 13, 66-70, U.N. Doc. A/CN.4/318/ADD.5-7 (1980); LELAND F. GOODRICH ET AL., CHARTER OF THE UNITED NATIONS 342-53 (3d ed. 1969); 2 O'CONNELL, *supra* note 4, at 795, 797, 803-08, 1044-45, 1095-1101. McCormack says that Goodrich et al. are among those favoring a restrictive or "reactive" view. See McCORMACK, *supra* note 1, at 122 (citing GOODRICH ET AL., *supra*, at 353). However, Goodrich et al. seem to be straddling the fence on the interpretation of U.N. Charter article 51. See GOODRICH ET AL., *supra*, at 342-53; INTERNATIONAL LAWYERS & NAVAL EXPERTS CONVENED BY THE INTERNATIONAL INSTITUTE OF HUMANITARIAN LAW, SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA ¶ 3, Commentary 3.3 (Louise Doswald-Beck ed., 1995). *San Remo Manual* takes no position on the issue.

6. See Lowe, *supra* note 1, at 128.

7. U.N. CHARTER art. 51.

If the Peace of Westphalia (1648) began the nation-state system,⁸ then the Congress of Vienna (1815) started the modern movement toward collective security.⁹ It is from this benchmark that Part I examines treaty systems through World War I. Part II analyzes treaty systems during the era of the Covenant of the League of Nations¹⁰ (1920-46) and the Pact of Paris¹¹ (1928) through World War II. Part III examines the drafting of the Charter and court decisions, including the Nuremberg International Military Tribunal, immediately following World War II. Part IV examines collective self-defense treaties concluded since 1945. Part V offers projections for the future of anticipatory collective self-defense in the Charter era.

Between the time of the American alliance with France (1778)¹² and the time of the Declaration of Panama (1939),¹³ the United States did not ratify a single mutual self-defense agreement. The lack of U.S. participation in this kind of arrangement may explain why many in the United States are not familiar with the concept of collective self-defense, particularly anticipatory collective self-defense. The concept of anticipatory col-

8. Treaty of Peace, Fr.-Holy Rom. Empire, Oct. 14/24, 1648, 1 Consol. T.S. 198, 319; Leo Gross, *The Peace of Westphalia 1648-1948*, 42 AM. J. INT'L L. 20 (1948) (commenting on the Treaty of Peace).

9. Act of the Congress of Vienna, June 9, 1815, 64 Consol. T.S. 453 (Fr.). The Treaty of Alliance, Mar. 15, 1815, 64 Consol. T.S. 27, was a linchpin of the Congress system; it was succeeded by the Treaty of Alliance and Friendship, Nov. 20, 1815, 65 Consol. T.S. 296 (Fr.). See EUGENE V. ROSTOW, TOWARD MANAGED PEACE 42-43 (1993). See also *infra* notes 14-25 and accompanying text. Parties to the Treaty of Peace were "obliged to defend and protect all and every Article of this Peace against any one." This represents an early statement of the collective self-defense principle. Treaty of Peace, *supra* note 8, art. 123, at 354. See also Gross, *supra* note 8, at 24.

10. The Covenant of the League of Nations was in the Treaty of Versailles, June 28, 1919, Part I, 225 Consol. T.S. 189, 195-205, and other World War I peace treaties, see, e.g., Treaty of Neuilly-sur-Seine, Nov. 27, 1919, Part I, 226 Consol. T.S. 332, 335 (Bulgaria); Treaty of St. Germain-en-Laye, Sept. 10, 1919, Part I, 226 Consol. T.S. 8, 13 (Austria); Treaty of Trianon, June 4, 1920, Part I, 113 Brit. For. & St. Pap. 486, 491-501 (Hungary). Although a signatory, the United States never ratified these treaties, primarily because the U.S. Senate opposed the Covenant. See Michael J. Glennon, *The Constitution and Chapter VII of the United Nations Charter*, 85 AM. J. INT'L L. 74, 75-76 (1991). Instead, the United States concluded bilateral peace treaties with Austria, Germany, and Hungary, thereby incorporating parts of the multilateral peace treaties. See, e.g., Treaty of Peace, Hung.-U.S., Aug. 29, 1921, art. 2, 42 Stat. 1951, 1953 (incorporating parts of Treaty of Trianon); Treaty of Peace, Ger.-U.S., Aug. 25, 1921, art. 2, 42 Stat. 1939, 1942 (incorporating parts of Treaty of Versailles); Treaty of Peace, Aus.-U.S., Aug. 24, 1921, art. 2, 42 Stat. 1946, 1948 (incorporating parts of Treaty of St. Germain-en-Laye). The Treaty of Sevres, Aug. 10, 1920, Part I, 113 Brit. & For. St. Pap. 652, 656, would have incorporated the Covenant for a peace treaty with Turkey but was never ratified. The Treaty of Lausanne, July 24, 1923, 28 L.N.T.S. 11, ended the war for Turkey but did not refer to the Covenant. As the United States had never declared war against Turkey, it did not sign a peace treaty with Turkey.

11. Treaty Providing for Renunciation of War as an Instrument of National Policy, Aug. 28, 1928, 46 Stat. 2343, 94 L.N.T.S. 57 [hereinafter Pact of Paris].

12. See Treaty of Alliance, Feb. 6, 1778, Fr.-U.S., arts. 1-4, 8 Stat. 6, 6-8. The Treaty of Amity and Commerce, Feb. 6, 1778, Fr.-U.S., arts. 6-7, 8 Stat. 12, 16, and the Treaty of Amity and Commerce, Oct. 8, 1782, Neth.-U.S., art. 5, 8 Stat. 32, 34-36, pledged mutual maritime defense to France and the Netherlands, respectively.

13. Declaration of Panama, Oct. 3, 1939, 3 Bevans 609. See also *infra* notes 190-99 and accompanying text.

lective self-defense has existed for nearly two centuries, including the fifty years during which the Charter has been in force, and this form of joint response by states appears to have attained the status of a customary norm.

I. From the Congress of Vienna to World War I

Only months after an ad hoc alliance¹⁴ defeated Napoleon I at Waterloo and established the Congress system,¹⁵ the principal powers began building alliances to assure peace. Austria, Prussia, and Russia pledged in the Holy Alliance¹⁶ (September 1815) that:

Conformably to . . . Holy Scriptures, which command all men to consider each other as brethren, the Three contracting Monarchs will remain united by . . . a true and indissoluble fraternity, and considering each other as fellow countrymen, they will, on all occasions and in all places, lend each other aid and assistance; and, regarding themselves toward their subjects and armies as fathers of families, they will lead them, in the same spirit of fraternity with which they are animated, to protect Religion, Peace, and Justice.¹⁷

While Great Britain's Prince Regent declined to join this Alliance, at least

14. Treaty of Alliance, Mar. 25, 1815, 64 Consol. T.S. 27.

15. Act of the Congress of Vienna, *supra* note 9 (providing for the reorganization of Europe). The coalition against Napoleon had pledged such a system in the Treaty of Alliance, Mar. 15, 1814, 64 Consol. T.S. 27. See also ALAN PALMER, *THE CHANCELLERIES OF EUROPE* 6 (1983).

16. Holy Alliance, Sept. 11-26, 1815, 65 Consol. T.S. 199 (Fr.).

17. *Id.* art. 1, 65 Consol. T.S. at 201. Article 2 also proclaimed:

In consequence, the sole principle of force, whether between the said Governments or between their Subjects, shall be that of doing each other reciprocal service, and of testifying by unalterable good will the mutual affection with which they ought to be animated, to consider themselves all as members of one and the same Christian nation; the three allied Princes looking on themselves as merely delegated by Providence to govern three branches of the One family, namely, Austria, Prussia, and Russia, thus confessing that the Christian world, of which they and their people form a part, has in reality no other Sovereign than Him to whom all the treasures of love, science, and infinite wisdom, that is to say, God, our Divine Saviour, the Word of the Most High, the Word of Life. Their Majesties consequently recommend to their people, with the most tender solicitude, as the sole means of enjoying that Peace which arises from a good conscience, and which alone is durable, to strengthen themselves every day more and more in the principles and exercise of the duties which the Divine Saviour has taught to mankind.

Id. art. 2, at 201. The preamble asserted that the signatories:

declare that the present [Alliance] has no other object than to publish, in the face of the whole world, their fixed resolution, both in the administration of their respective States, and in their political relations with every other Government, to take for their sole guide the precepts of that Holy Religion, namely, the precepts of Justice, Christian Charity, and Peace, which, far from being applicable only to private concerns, must have an immediate influence on the councils of Princes, and guide all their steps, as being the only means of consolidating human institutions and remedying their imperfections.

six other European states acceded to it.¹⁸ The result was codified in the Treaty of Alliance and Friendship in November 1815, which continued the earlier alliance's collective security policy.¹⁹ Besides confirming standing forces in France, the allies agreed to:

concert together, without loss of time, as to the additional . . . troops to be furnished . . . for the support of the common cause; and they engage to employ, in case of need, the whole of their forces . . . to bring the War to a speedy and successful termination, reserving to themselves to prescribe, by common consent, such conditions of Peace as shall hold out to Europe a sufficient guarantee against the recurrence of a similar calamity, [that is, the advent of another conquest.]²⁰

They also agreed to meet periodically to "consult . . . upon their common interests, and for the consideration of the measures which at each of those periods shall be considered the most salutary for the repose and prosperity of Nations, and for the maintenance of the Peace of Europe."²¹

The Alliance, to which France was admitted as part of the Concert of Europe in 1818,²² had two policies: periodic consultations to consider measures to help preserve peace; and the commitment of forces to end any conflict that had ignited.²³ The Alliance thus bespoke the collective self-defense concept and, depending on the nature of consultations and actions decided, a potential for anticipatory self-defense.²⁴ An example of the lat-

Id. preamble, at 200-01. See also PALMER, *supra* note 15, at 21-23.

18. See Letter from Emperor Francis of Austria, King Frederick William of Prussia, and Tsar Alexander of Russia to George, Prince Regent of Great Britain (Sept. 26, 1815); letter from Prince Regent to Francis, Frederick William and Alexander (Oct. 6, 1815), reprinted in 1 KEY TREATIES FOR THE GREAT POWERS 1814-1914, at 97-99 (Michael Hurst ed., 1972) [hereinafter KEY TREATIES]. The Holy Alliance continued to function, to a certain extent, until the crisis leading to the Crimean War. See generally PALMER, *supra* note 15, at 23; A.J.P. TAYLOR, THE STRUGGLE FOR MASTERY IN EUROPE: 1848-1918 chs. 2-3 (1954). The Alliance extended to the New World through family ties between the Austrian court and Brazil, a kingdom (1815) and an empire itself from 1822. The Alliance was a rationale for the Congress of Panama (1826) and the Monroe Doctrine. See O. CARLOS STOETZER, THE ORGANIZATION OF AMERICAN STATES 7, 9, 14 (2d ed. 1993). Article 21 of the Covenant of the League of Nations declared the Covenant would not "affect the validity of international engagements, such as . . . regional understandings like the Monroe Doctrine, for securing the maintenance of peace." LEAGUE OF NATIONS COVENANT art. 21. See also *infra* notes 45, 158-62, 190-99, 205-07, 255-62 and accompanying text.

19. Treaty of Alliance and Friendship, Nov. 20, 1815, preamble, 65 Consol. T.S. 296 (Fr.), referring to Treaty of Alliance, Mar. 15, 1815, 64 Consol. T.S. 27. See also PALMER, *supra* note 15, at 6, 25-28.

20. Treaty of Alliance and Friendship, *supra* note 19, art. 4, 65 Consol. T.S. at 298.

21. *Id.* arts. 3-4, 6, at 297-98.

22. Protocol of Conference, Nov. 15, 1818, 69 Consol. T.S. 365 (Fr.). The Concert of Europe "formed what was arguably the most successful postwar European Settlement" and was a set of informal understandings in which European powers acted to defuse problems that might lead to conflict among them. MICHAEL MANDELBAUM, THE DAWN OF PEACE IN EUROPE 106 (1996). See also DONALD KAGAN, ON THE ORIGINS OF WAR AND THE PRESERVATION OF PEACE 83 (1995); Gross, *supra* note 8, at 20. Treaties discussed in this Part frequently resulted from these conferences.

23. See Treaty of Alliance and Friendship, *supra* note 19, 65 Consol. T.S. 296.

24. A decade later Russia and Turkey concluded Treaty of Defensive Alliance, July 8-26, 1833, arts. 1, 3-4, 84 Consol. T.S. 1, 3-5 (providing that Russia would furnish forces

ter occurred in 1848, when revolution in France resulted in the transition to the Second Republic. Fearing a new war of French national liberation, Prussia put its Rhine troops on alert, and Russia directed its armies to be ready for war. Tsar Nicholas was dissuaded from sending 30,000 to help Prussia, a move that might have resulted in war.²⁵

It was in this context that the *Caroline Case* (1842) formulated the right of anticipatory self-defense, which held that a proportional anticipatory response in self-defense is permissible when the need is necessary, instant, overwhelming, and admitting of no other alternative with "no moment for deliberation."²⁶ The final requirement — no moment for deliberation — is not inconsistent with consultation clauses in the early treaties. States, then and now, may consult and decide whether to employ anticipatory collective self-defense as a response to a threat. Moreover, states might agree that those countries claiming a right of anticipatory self-defense may respond through collective self-defense.

A. The Crimean War

The potential for reactive and anticipatory collective self-defense was realized again during the Crimean War (1854).²⁷ The war erupted when Russia occupied the Turkish principalities of Moldavia and Wallachia. Britain and France declared that:

[they had] concerted, and will concert together, as to the most proper means for liberating the territory of the Sultan from foreign invasion, and for accomplishing the object . . . [of reestablishing peace between Russia and Turkey and preserving the continent from "lamentable complications which . . . so unhappily disturbed the general Peace"]. . . . [T]hey engage to maintain, according to the requirements of the war, to be judged of by common agreement, sufficient naval and military forces to meet those requirements, the description, number, and destination whereof shall, if occasion should

to Turkey for defense against attack). The Final Act of Ministerial Conferences to Complete and Consolidate Organization of the Germanic Confederation, May 15, 1820, arts. 35-41, 47, 71 Consol. T.S. 89, 116-18 (Gr.), contemplated collective action for threatened attacks as well as invasions. The Treaty of Peace, Aug. 23, 1866, Aus.-Pruss., art. 4, 133 Consol. T.S. 71, 82 dissolved the Confederation (Gr.).

25. See PALMER, *supra* note 15, at 81-82. Fearful of an attempted Spanish reconquest of South America's Andean states, Bolivia, Chile, New Granada (now Colombia) and Peru signed the Treaty of Lima, Feb. 8, 1848, which established a confederation of the signatories to meet the perceived threat. The danger dissipated, however, and the treaty was never ratified. See SROETZER, *supra* note 18, at 9.

26. R.Y. Jennings, *The Caroline and McLeod Cases*, 32 AM. J. INT'L L. 82, 89 (1938). See also NWP 9A, *supra* note 1, ¶ 4.3.2.1, n.29 (citing Bunn, *supra* note 1, at 70); Letter from U.S. Secretary of State Daniel Webster to U.K. Ambassador Lord Alexander B. Ashburton, Aug. 6, 1842, in *Destruction of the Caroline*, 2 MOORE DIGEST § 217, at 411-12 (1906); Letter of Secretary Webster to U.K. Minister Henry S. Fox, Apr. 24, 1841, in 1 KENNETH E. SHEVMAKER, *THE PAPERS OF DANIEL WEBSTER: DIPLOMATIC PAPERS* 58, 67 (1983). NWP 1-14 departs from this language, arguing that "the Webster formulation is clearly too restrictive today, particularly given the nature and lethality of modern weapons systems which may be employed with little, if any, warning." NWP 1-14, *supra* note 1, ¶ 4.3.2.1 n.32.

27. For analysis of wartime diplomacy, see PALMER, *supra* note 15, at 101-10; TAYLOR, *supra* note 18, at 62-82.

arise, be determined by subsequent arrangements.²⁸

Britain and France renounced "[a]cquisition of any advantage for themselves" and invited other European powers to accede to the alliance.²⁹ Austria and Prussia tried to avoid involvement in the war "and the dangers arising therefrom to the Peace of Europe"³⁰ by concluding a Treaty of Alliance, which stated, *inter alia*, that "a mutual offensive advance is stipulated for only in the event of the incorporation of the Principalities, or . . . attack on or passage of the Balkans by Russia."³¹ In late 1854, Austria, Britain, and France allied in an attempt to protect Austria's occupation of the same principalities against the return of Russian forces. In the event of war between Austria and Russia, the three countries pledged their "Offensive and Defensive Alliance in the present War, and will for that purpose employ, according to the requirements of the War, Military and Naval Forces."³² Similar terms appeared in an allied convention with Sardinia in 1855.³³ That same year, Britain and France pledged to "furnish . . . Sweden . . . sufficient Naval and Military Forces to Co-operate with the Naval and Military Forces of [Sweden to] . . . resist . . . Pretensions or Aggressions of Russia."³⁴ The treaty ring around Russia thus tightened.

Preparations for the Crimea expedition, proposed in the Anglo-French treaty,³⁵ clearly reflected the principle of anticipatory self-defense. Likewise, the Austro-Prussian alliance recognized the concept of "Offensive Advance," anticipatory action if Russia moved through the Balkans,³⁶ that is, the parties would attack Russia only if Russia passed through territory close to Austrian borders. Similar concepts were recognized in both the Austro-Anglo-French alliance and the Sardinia military convention.³⁷ The Swedish treaty also provided a preemptive strategy in case of Russian aggression.³⁸

28. Convention Relative to Military Aid to Be Given to Turkey, Apr. 10, 1854, Fr.-Gr. Brit., art. 2, 111 Consol. T.S. 393, 395-96, *referring to art. 1.*

29. *Id.* art. 4, 111 Consol. T.S. at 396.

30. Treaty of Offensive and Defensive Alliance, Apr. 20, 1854, Aus.-Pruss., Preamble, 111 Consol. T.S. 413, 422.

31. *Id.*, 111 Consol. T.S. at 424.

32. Treaty of Alliance, Dec. 2, 1854, arts. 3, 6, 112 Consol. T.S. 295, 298 (Fr.) (translation by Author). Later arrangements would determine the numbers, description, and destination of the forces. *Id.* Prussia was later invited to accede. *Id.*

33. *Id.* Cf. Military Convention, Jan. 26, 1855, 112 Consol. T.S. 453 (Fr.).

34. Common agreement would determine forces' numbers, description, and destination. Sweden pledged not to cede, exchange territory, give pasturage, or fishery rights "or rights of any other nature whatsoever, . . . and to resist any pretension . . . by Russia . . . to establish the existence of any . . . Rights aforesaid." Treaty of Stockholm, Nov. 21, 1855, arts. 1-2, 114 Consol. T.S. 13, 15-16 (Fr.) (translation by Author). The United States observed "benevolent neutrality" in favor of Russia during the war. JOHN LEWIS GADDIS, *THE LONG PEACE: INQUIRIES INTO THE HISTORY OF THE COLD WAR* 5 (1987).

35. Convention Relative to Military Aid to Be Given to Turkey, *supra* note 28.

36. Treaty of Offensive and Defensive Alliance, *supra* note 30.

37. Treaty of Stockholm, *supra* note 34.

38. A treaty, ending the Crimean War, provided for mediating future disputes before recourse to force and was a forerunner of U.N. CHARTER art. 33. See General Treaty for Re-Establishment of Peace, Mar. 30, 1856, art. 8, 114 Consol. T.S. 409, 414 (Fr.). A related protocol suggested the procedure be available for future disputes. Protocol of

Alliances embodying the principle of anticipatory self-defense were both formal and informal. France and Sardinia concluded an oral agreement prior to the Franco-Austrian war (1858-59).³⁹ This agreement is an example of a self-defense arrangement made without benefit of a formal treaty. It created both a defensive and offensive alliance. France pledged to come to the aid of Sardinia if it or Austria declared war, and further stated its intention to declare war should Italian territory become occupied, Austria violate an existing treaty, or a similar event occur.⁴⁰ During the Franco-Prussian War (1870-71), the belligerents informally agreed to cooperate with Britain to assure Belgian neutrality if Belgium was threatened by an opponent.⁴¹ In both cases, the potential for conflict was great and could have led to what would be considered today as anticipatory self-defense. The utility of an informal self-defense arrangement is further illustrated by Napoleon III's response to Prussian mobilization of six army corps during the 1858-59 conflict; this anticipatory action "inclined him further to make peace."⁴² Likewise a Russian-U.S. informal arrangement was proposed during the U.S. Civil War, when a Russian admiral confidentially advised U.S. Admiral David G. Farragut in 1863 that he had "sealed orders" to support the United States if it became involved in conflict with a foreign power (such as Britain or France) which supported the Confederacy, a war that never was.⁴³ As will be seen, this form of informal collective self-defense is available today under the U.N. Charter.⁴⁴

Conference, Apr. 14, 1856, *reprinted in* 1 KEY TREATIES, *supra* note 18, at 334. In the Western Hemisphere, as a result of the William Walker filibustering expeditions, Chile, Ecuador, and Peru signed, but did not ratify, a Treaty of Mutual Assistance and Confederation, which provided that if the United States attacked one or more parties, "all would unite against the aggressor." STOETZER, *supra* note 18, at 9-10. The treaty was never ratified. *Id.*

39. Count Nigra, Notes on Results of Meeting between Napoleon III of France and Count Cavour of Piedmont, July 20, 1858, arts. 1, 3-4, *reprinted in* KEY TREATIES, *supra* note 18, at 401.

40. *Id.*

41. Treaty Relative to Independence and Neutrality of Belgium, Aug. 9, 1870, Gr. Brit.-Pruss., arts. 1-2, 141 Consol. T.S. 435, 438-39; Treaty Relative to Independence and Neutrality of Belgium, Aug. 11, 1870, Fr.-Gr. Brit., arts. 1-2, 141 Consol. T.S. 441, 443-44. *See also* Treaty Relative to Separation of Belgium from Holland, Nov. 15, 1831, art. 7, 82 Consol. T.S. 255, 259 (Fr.); Treaty of London, Apr. 19, 1839, art. 7, 88 Consol. T.S. 445, 449 (Fr.) (also guaranteeing Belgian neutrality). German violation of Belgian neutrality was a cause of World War I. *See* KAGAN, *supra* note 22, at 61, 129, 204.

42. PALMER, *supra* note 15, at 118.

43. The Russian fleets were wintering in New York and San Francisco at this time. JAMES P. DUFFY, LINCOLN'S ADMIRAL: THE CIVIL WAR CAMPAIGNS OF DAVID FARRAGUT 220-21 (1997). The Russian visit came at a low point in Union fortunes; the Russians were feted in New York, San Francisco, and Washington. Whether Russia and the United States discussed an alliance then or in 1861 has been debated; most assert that there were at least conversations toward that end. *See* D.P. CROOK, THE NORTH, THE SOUTH, AND THE POWERS 1861-1865, at 317-18 (1974); DONALDSON JORDAN & EDWIN J. PRATT, EUROPE AND THE AMERICAN CIVIL WAR 200-01 (1969); ALBERT A. WOLDMAN, LINCOLN AND THE RUSSIANS ch. 9 (1952). Gaddis linked this proposed cooperation to U.S. "benevolent neutrality" during the Crimean War. GADDIS, *supra* note 34, at 5-6.

44. *See infra* Part IV.

Western Hemisphere states, but not the United States, negotiated the same kind of alliances as those in Europe. In Latin America, the War of the Triple Alliance (1865-70) inspired Argentina, Brazil, and Uruguay to sign an offensive and defensive alliance to oppose Paraguayan aggression. At the same time, other Latin American countries signed defensive alliances pledging consultation and mutual defense against aggressors or acts intending to deprive them of sovereignty and independence.⁴⁵

B. The Treaty Map Up to World War I, 1871-1914

After the Franco-Prussian War ended,⁴⁶ agreements culminating in the Triple Alliance (Austria-Hungary, Germany, Italy), and those resulting in the Entente of France and Russia, and ultimately, Great Britain, contained elements of reactive or anticipatory self-defense. The 1907 Hague Conventions, which are still in force, imposed rules for war declarations⁴⁷ and forbade resort to war to collect contract debts.⁴⁸ However, the Convention does not address the collective self-defense issue. States continued to rely on alliance systems to provide collective self-defense. Some alliances explicitly recognized anticipatory self-defense. Taylor points out that these alliances, along with economic development on the Continent, gave Europe thirty-four years of peace.⁴⁹ Cannot the same be said about alliance systems⁵⁰ and regional economic development treaties⁵¹ since World War II?

The Convention of Schonbrunn (1873) provided that if an "aggression coming from a third Power should threaten to compromise the peace of Europe, [the parties] mutually engage to come to a preliminary understanding . . . to agree as to the line of conduct to be followed in common."⁵²

45. Treaty of Alliance Against Paraguay, May 1, 1865, Arg.-Braz.-Uru., art. 1, 131 Consol. T.S. 119, 120 (Fr.); Treaty of Union and Defensive Alliance, Jan. 23, 1865, art. 1, 130 Consol. T.S. 401, 402; Treaty of Alliance, July 10, 1865, 131 Consol. T.S. 305, 306 (Fr.); *see also* STOETZER, *supra* note 18, at 10, 266. A war with some of these states sputtered on until the United States mediated an armistice in 1871. *See* Armistice, Apr. 11, 1871, 143 Consol. T.S. 129, 132.

46. Definitive Treaty of Peace, May 10, 1871, Fr.-Ger., 143 Consol. T.S. 163 (Fr.).

47. ROBERT H. FERRELL, *PEACE IN THEIR TIME: THE ORIGINS OF THE KELLOGG-BRIAND PACT* 5-6 (1968), *referring to* Hague Convention (III) Relative to Opening of Hostilities, Oct. 18, 1907, arts. 1, 3, 36 Stat. 2259, 2271 [hereinafter Hague III].

48. Hague Convention (II) Respecting Limitation of Employment of Force for Recovery of Contract Debts, Oct. 18, 1907, art. 1, Stat. 2241, 2251 [hereinafter Hague II].

49. TAYLOR, *supra* note 18, at 255.

50. GADDIS, *supra* note 34, at 222 (notes that the simpler alliance systems of the Cold War era, coinciding with much of the Charter era, are more durable than those of the past century, which depended on the skill of a Metternich or Bismarck to hold them together).

51. For analysis of alliance systems since World War II in the context of collective self-defense, *see infra* notes 253-329 and accompanying text. *See also* George K. Walker, *Integration and Disintegration in Europe: Reordering the Treaty Map of the Continent*, 6 *TRANSNAT'L LAW*, 1, 12-24 (1993) (surveying development of European economic systems, particularly the European Union).

52. Agreement, May 25-June 6, 1873, Aus.-Hung. - Russ., 146 Consol. T.S. 217 (to which Germany acceded Oct. 22, 1873). *See* 2 *KEY TREATIES*, *supra* note 18, at 508; PALMER, *supra* note 15, at 151.

A special convention would be necessary to undertake military action.⁵³ In 1878, Britain concluded a Defensive Alliance with Turkey, which was directed against Russian aggression.⁵⁴ In 1879 Austria-Hungary and Germany negotiated a Treaty of Alliance aimed at Russia. If Russia attacked either party alone or "by an active co-operation or by military measures which constitute a menace to the Party attacked," the other must assist "with the whole war strength of their Empires."⁵⁵ It was "the first permanent arrangement in peace-time between two Great Powers since the end of the *ancien regime*."⁵⁶ Two years later, the three empires were on the same side and pledged that, if one party were at war with a fourth Great Power, the others would maintain "benevolent neutrality."⁵⁷ At about the same time, Chile fought Bolivia and Peru in the Pacific War, which resulted in loss of Bolivia's coast and Peruvian territory. The defensive alliance between the two states pledged defense against "all foreign aggression" or acts designed to deprive a party of sovereignty and independence.⁵⁸

Treaties to isolate France began with the Treaty of the Triple Alliance (Austria-Hungary, Germany, and Italy, 1882), which was "one of the most stable and important of the European alignments" until 1915.⁵⁹ If France attacked either Italy or Germany, or if one or two signatories were attacked "without provocation" and were at war with two or more other Powers, then

53. Agreement, *supra* note 52, arts. 2-3, 146 Consol. T.S. 220-21.

54. Convention of Defensive Alliance, June 4, 1878, Gr. Brit.-Turk., art. 1, 153 Consol. T.S. 67, 69.

55. Treaty of Alliance, Oct. 7, 1879, Aus.-Hung. - Ger., arts. 1-2, 155 Consol. T.S. 303, 307 (extended for five years by Protocol in Regard to Prolongation of Alliance of 1879, Mar. 22, 1883, reprinted in 2 KEY TREATIES, *supra* note 18, at 629). Protocol Concerning Continuation of Treaty of 1879 and Protocol of 1883, June 1, 1902, Aus.-Hung. - Ger., 155 Consol. T.S. at 732 extending the arrangement indefinitely on a three-year renewal basis.

56. TAYLOR, *supra* note 18, at 264. See also WILLIAM L. LANGER, EUROPEAN ALLIANCES AND ALIGNMENTS 171-96 (1931) [hereinafter LANGER, EUROPEAN ALLIANCES]; PALMER, *supra* note 15, at 163-66 (discussing negotiations between French and Russian officials from 1870-1880).

57. This provision applied if a party were at war with Turkey, but only after previous agreement among the three states. League of the Three Emperors, June 18, 1881, art. 1, 158 Consol. T.S. 471. A treaty extended and slightly modified the 1881 agreement. Treaty Concerning Prolongation of Treaty of 1881, Apr. 15, 1884, reprinted in 2 KEY TREATIES, *supra* note 18, at 634. The parties pledged friendly neutrality if either was at war. See Treaty of Alliance, June 16/28, 1881, Aus.-Hung. - Serbia, 159 Consol. T.S. 10, extended to 1895 by Treaty Prolonging the Treaty of 1881, Jan. 28-Feb. 9, 1889, Aus.-Hung. - Serbia, 171 Consol. T.S. 485. The three empires pledged reciprocal "loyal and absolute neutrality" if either was involved in war with a third state; the treaty did not apply to the Balkans. Declaration Affirming Engagement of Mutual Neutrality, Oct. 2-Oct. 15, 1904, Aus.-Hung. - Russ., 196 Consol. T.S. 392, 394. For analysis of the League, *supra*, see LANGER, EUROPEAN ALLIANCES, *supra* note 56, at 196-212; TAYLOR, *supra* note 18, at 5, 272-79, 304 (arguing the League was a "fair-weather system" that "worked only so long as there was no conflict").

58. Treaty of Defensive Alliance, Feb. 6, 1873, Bol.-Peru, art. 1, 145 Consol. T.S. 475, 484, and Protocol, May 5, 1879, 145 Consol. T.S. 482. See also Treaty of Peace and Amity, Oct. 20, 1883, Chile-Peru, 162 Consol. T.S. 458; Armistice Convention, Apr. 4, 1884, Bol.-Chile, 163 Consol. T.S. 423; STROETZER, *supra* note 18, at 10, 266.

59. LANGER, EUROPEAN ALLIANCES, *supra* note 56, at 246.

the other had to join the conflict.⁶⁰ Articles 4 and 5 provided:

[If] a Great Power nonsignatory to the . . . Treaty should threaten the security of the states of one . . . Part[y], and the threatened Party should find itself forced on that account to make war against it, the two others bind themselves to observe towards their Ally a benevolent neutrality. Each . . . reserves to itself, in this case, the right to take part in the war, if it should see fit, to make common cause with its Ally.

. . . If the peace of any . . . Part[y] should chance to be threatened under the circumstances foreseen by . . . Articles [1-4], the . . . Parties shall take counsel together in ample time as to the military measures to be taken with a view to eventual co-operation.

Secrecy was pledged;⁶¹ this was among many "secret" treaties of the era,⁶² which were not truly secret, being so only for specific terms. In their "secrecy" they were actually "engines of publicity."⁶³

60. Treaty of Alliance, May 20, 1882, arts. 2-3, 160 Consol. T.S. 237, 241.

61. *Id.* arts. 4-6, 160 Consol. T.S. at 241, renewed by Second Treaty of Triple Alliance, Feb. 20, 1887, art. 1, 169 Consol. T.S. 139, 141. Separate Treaty, Feb. 20, 1887, Aus-Hung. - Italy, 169 Consol. T.S. 143. Another treaty required Germany to go to war if Italy went to war to protect its African interests. Separate Treaty, Feb. 20, 1887, Ger.-Italy, 169 Consol. T.S. 147. Germany and Russia signed the Reinsurance Treaty, June 18, 1887, arts. 1-2, Ger.-Russ., 169 Consol. T.S. 317 (pledging that if either went to war with a third Great Power, the other would observe "benevolent neutrality"). The treaty also recognized Russia's interest in the Balkan peninsula and that the Straits of the Bosphorus and Dardanelles should always remain open. *Id.* See Additional Protocol, June 18, 1887, Ger.-Russ., 169 Consol. T.S. 323-24 (providing that Germany would help Russia establish a regular government in Bulgaria, and that Germany would be a benevolent neutral if Russia was required to defend the entrance to the Black Sea). The Reinsurance Treaty, *supra*, was allowed to lapse in 1890. See PALMER, *supra* note 15, at 179. A third Triple Alliance was negotiated in Treaty of Alliance, May 6, 1891, 175 Consol. T.S. 105. See also Fourth Treaty of Triple Alliance, June 28, 1902, art. 14, 191 Consol. T.S. 286, 295 (renewing the alliance for six years, with a possibility of a further six-year renewal); Agreement Explaining and Supplementing Article VII of the Treaty of Triple Alliance of 1887, Dec. 15, 1909, Aus-Hung. - Italy, reprinted in 2 KEY TREATIES, *supra* note 18, at 812 (dealing with Balkan issues); Fifth Treaty of Triple Alliance, Dec. 5, 1912, 217 Consol. T.S. 311 (renewing the alliance for the last time). The 1882 treaty's operative terms, arts. 1-5, remained the same throughout.

62. For example, the Secret Protocol, Nov. 15, 1818, 69 Consol. T.S. 369, among the victors of the Napoleonic wars, had a Military Protocol, *id.* at 374, and was signed the same day the published treaty, Protocol of Conference, *supra* note 22, admitted France to the Concert of Europe. See also *supra* notes 14-25 and accompanying text. Article 18 of the Covenant of the League of Nations required that League Members' future treaties be registered with the League Secretariat and be published by it. No treaty would be binding until registered. This superseded terms like article 6 of the Treaty of Alliance and state practice. See Treaty of Alliance, May 20, 1882, art. 6, 160 Consol. T.S. 241. "Open covenants of peace openly arrived at" had been the first of President Woodrow Wilson's Fourteen Points, however, Covenant Members soon ignored art. 18. See FERRELL, *supra* note 47, at 54-61. Article 102 of the U.N. Charter admonishes Members to submit their treaties for registration; a consequence for nonfulfillment is that a treaty cannot be invoked before a U.N. organ. See GOODRICH ET AL., *supra* note 5, at 610-14; SIMMA, *supra* note 1, at 1103-16. Security agreements are often not published. RESTATEMENT (THIRD) OF THE UNITED STATES FOREIGN RELATIONS LAW § 312 r.n.5 (1987) [hereinafter RESTATEMENT (THIRD)].

63. TAYLOR, *supra* note 18, at 264.

In 1883, Romania and Austria-Hungary agreed that if either was attacked "without provocation," an obligation on the other would arise. If either was "threatened by an aggression under [these] . . . conditions," the governments would confer, and a military convention would govern operations.⁶⁴ Germany acceded to this treaty, as did Italy.⁶⁵

The third Triple Alliance⁶⁶ resulted in the formation of the Entente Cordiale between France and Russia. In an exchange of notes, France and Russia agreed that if "peace should be actually in danger, and especially if . . . [a] part[y] should be threatened with an aggression, the two parties undertake to reach an understanding on measures whose immediate and simultaneous adoption would be imposed upon the two Governments by the realization of this eventuality."⁶⁷ A Military Convention followed in 1892, providing that if either the Triple Alliance forces or an Alliance state should mobilize, France and Russia, "at the first news of the event and without the necessity of any previous concert, shall mobilize immediately and simultaneously the whole of their forces and shall move them . . . to their frontiers"⁶⁸ to force a two-front war. Respective general staffs would cooperate to prepare and facilitate execution of these measures.⁶⁹ These terms were generally not known, but most diplomats considered France

64. Romania had to aid Austria-Hungary only if it was attacked in territory of states bordering Romania. Treaty of Alliance, Oct. 30, 1883, Aus.-Hung. - Rom., arts. 2-3, 162 Consol. T.S. 488, 491.

65. Germany accepted the treaty verbatim; Italy required consultation before action. Treaty Providing for Accession of Germany, Oct. 30, 1883, 162 Consol. T.S. 487, 493; Treaty Providing for Accession of Italy, May 15, 1888, 171 Consol. T.S. 61; Treaty of Alliance, July 13-25, 1892, Aus.-Hung. - Rom., 177 Consol. T.S. 273 (renewing the relationship). Germany and Italy acceded. Treaty Providing for Accession of Germany to the Alliance, Nov. 11-12, 1892, 178 Consol. T.S. 17; Treaty Providing for Accession of Italy to the Alliance, Nov. 28, 1892, 128 Consol. T.S. 39; Protocol, Sept. 30, 1896, 183 Consol. T.S. 379 (extending the alliance to 1903). Germany and Italy acceded. Accession of Germany, May 7, 1899, *id.* at 383; Accession of Italy, June 5, 1899, 183 Consol. T.S. 389. The relationship was extended by the Third Treaty Renewing Alliances of 1892 and 1896, Apr. 4-17, 1902, Aus.-Hung. - Rom., 191 Consol. T.S. 117; Treaty Providing for Accession of Germany to the Alliance, July 12-25, 1902, *reprinted in* 2 KEY TREATIES, *supra* note 18, at 729; Treaty Providing for Accession of Italy to the Alliance, Dec. 12, 1902, Aus.-Hung. - Italy, *reprinted in* 2 KEY TREATIES, *supra* note 18, at 730. The relationship was extended by Treaty Renewing the Alliances of 1892, 1896, and 1903, Feb. 5, 1913, 217 Consol. T.S. 384; Treaty Providing for Accession of Germany to the Alliance, Feb. 13-26, 217 Consol. T.S. 390; and Treaty Providing for Accession of Italy, Mar. 5, 1913, Aus.-Hung. - Italy, 217 Consol. T.S. 393.

66. Treaty of Alliance, May 20, 1882, 160 Consol. T.S. 237. *See also supra* notes 59-63.

67. Note from Russian Ambassador to France M. de Mohrenheim to French Foreign Minister M. Ribot, Aug. 15-27, 1891, annexing Letter of Russian Foreign Affairs Minister Nikolai Giers to de Mohrenheim, Aug. 9-21, 1891; Note of Ribot to de Mohrenheim, Aug. 27, 1891, *reprinted in* 2 KEY TREATIES, *supra* note 18, at 662-65.

68. Draft of Military Convention, 1892, Fr.-Russ., art. 2, *reprinted in* 2 KEY TREATIES, *supra* note 18, at 669, *approved by* Note of Giers to French Ambassador to Russia M. de Montbello, Dec. 15-27, 1893, *id.* at 669. For diplomatic history analysis, see 1 WILLIAM L. LANGER, *THE DIPLOMACY OF IMPERIALISM 1890-1912* chs. 1-2 (1935) [hereinafter LANGER, *DIPLOMACY*]; TAYLOR, *supra* note 18, ch. 15.

69. *See* Draft of Military Convention, *reprinted in* 2 KEY TREATIES, *supra* note 18, at 668-69.

and Russia partners.⁷⁰ Britain joined the Entente by separate arrangements with France (1904)⁷¹ and Russia (1907)⁷² but signed no formal defense alliances, despite Russia's desire that it do so.⁷³ In 1906, however, Britain began unofficial military and naval conversations with France.⁷⁴

A 1904 Bulgaria-Serbia alliance, directed against Turkey, "promise[d] to oppose, with all the power and resources at their command, any hostile act or . . . occupation of four Balkan provinces."⁷⁵ The alliance also pledged joint defense "against any encroachment from any source . . . on the present territorial unity . . ."⁷⁶ If either event happened, the allies would conclude a special military convention.⁷⁷ In 1912, these countries negotiated the same arrangement and this time included a military convention.⁷⁸ Bulgaria also negotiated an alliance with Greece; it provided that if either "should be attacked by Turkey, either on its territory or through systematic disregard of its rights, based on treaties or on the fundamental principles of international law," the other would assist the defense.⁷⁹ Similarly, in 1913, Greece and Serbia signed an alliance and military convention providing that if "one of the two . . . should be attacked without any provocation on its part," the other would assist with all of its armed

70. See PALMER, *supra* note 15, at 180.

71. See *id.* at 203; TAYLOR, *supra* note 18, ch. 18 (analyzing Declaration Respecting Egypt and Morocco, Apr. 8, 1904, Fr.-Gr. Brit., 195 Consol. T.S. 198); Convention Respecting Newfoundland and West and Central Africa, Apr. 8, 1904, Fr.-Gr. Brit., 195 Consol. T.S. at 205. See also KAGAN, *supra* note 22, at 177-78.

72. See PALMER, *supra* note 15, at 211. See also TAYLOR, *supra* note 18, at 427-46 (analyzing Convention Relating to Persia, Afghanistan and Tibet, Aug. 31, 1907, Gr. Brit.-Russ., 204 Consol. T.S. 404).

73. See TAYLOR, *supra* note 18, at 511. Only after the Great War began did Britain, France and Russia sign the Pact of London, Sept. 5, 1914, Gr.Brit.-Fr.-Russ., 220 Consol. T.S. 330 (pledging continuing the conflict until a satisfactory peace could be obtained). See also PALMER, *supra* note 15, at 232.

74. KAGAN, *supra* note 22, at 150-51; PALMER, *supra* note 15, at 209. DON COOK, *FORGING THE ALLIANCE* 75 (1989), claims Britain's first peacetime defensive alliance was Treaty of Dunkirk, Mar. 4, 1947, Fr.-U.K., 9 U.N.T.S. 187. However, the United Kingdom, in effect, allied with other states in Treaty of Alliance and Friendship, *supra* note 19, to enforce the Congress of Vienna system, the Nyon Arrangement, Sept. 14, 1937, 181 L.N.T.S. 135, and Arrangement Supplementary to the Nyon Arrangement, Sept. 17, 1937, *id.* at 149, and with Poland just before World War II. See *supra* notes 14-25; *infra* notes 163-68, 183, 263-69, 315 and accompanying text. While Cook's statement is technically correct, the effect of these treaties was a defense alliance in each case.

75. Treaty of Alliance, Mar. 30, 1904, Bulg.-Serb., art. 3, reprinted in 2 KEY TREATIES, *supra* note 18, at 752.

76. *Id.* art. 2.

77. *Id.* art. 4.

78. Treaty of Amity and Alliance, Feb. 29-Mar. 13, 1912, Bulg.-Serb., 215 Consol. T.S. 390; Military Convention, Bulg.-Serb., Apr. 29-May 11, 1912, reprinted in 2 KEY TREATIES, *supra* note 18, at 822. An Alliance, Sept. 12-Oct. 6, 1912, Monteneg.-Serb., reprinted in 2 KEY TREATIES, *supra* note 18, at 828, included a decision in the Political Convention, art. 4, reprinted in 2 KEY TREATIES, *supra* note 18, at 829, to go to war with Turkey. Articles 1 and 2 of the Military Convention provided for strategic defensive in war with Austria-Hungary and strategic offensive in war with Turkey. See The Military Convention, arts. 1-2, reprinted in 2 KEY TREATIES, *supra* note 18, at 829.

79. Treaty of Defensive Alliance, May 16-29, 1912, Bulg.-Ger., art. 1, 216 Consol. T.S. 179. See also Military Convention, Sept. 12, 1912, Bulg.-Ger., reprinted in 2 KEY TREATIES, *supra* note 18, at 830.

forces.⁸⁰

In 1911, despite its reticence to commit in Europe,⁸¹ Britain concluded a defensive alliance with Japan; the treaty contained the almost standard articles for prior consultation, armed common defense upon unprovoked attack or aggressive action by a third state, with a military and naval arrangement to follow, and periodic military consultations.⁸²

C. Analysis

This labyrinth of agreements did not prevent the Great War.⁸³ Neither the Hague ultimatum system,⁸⁴ nor the language of these treaties, which pledged reactive self-defense and the possibility for anticipatory self-defense, could stop mobilizations and war declarations.⁸⁵ The application of military force and the failure to properly use diplomacy through treaties,⁸⁶ as opposed to the self-defense provisions in such treaties, led to the cataclysm.

The treaties of 1815-1914 were not drafted with today's concepts of self-defense, anticipatory self-defense, or collective self-defense in mind. They have been superseded by the Pact of Paris insofar as they justify resort to offensive war as national policy,⁸⁷ and by the Covenant and the Charter as to their secrecy provisions.⁸⁸ They were conditioned by the 1907 Hague Conventions.⁸⁹ Nevertheless, several principles emerged, including the concept of collective (multilateral and bilateral) self-defense. Many treaties had general statements requiring prior consultation.⁹⁰ Although most spoke of reactive self-defense, that is, the contemporary "restrictive view" of awaiting a first attack before responding, some contemplated anticipatory response.⁹¹

80. Treaty of Alliance, May 19-June 1, 1913, Ger.-Serb., art. 1, 218 Consol. T.S. 166, 167 (Fr.); Military Convention, May 19-June 1, 1913, 218 Consol. T.S. 170 (Fr.). See also Protocol Concerning Conclusion of Treaty of Alliance, Apr. 22-May 5, 1913, 218 Consol. T.S. 117. The Second Balkan War ended with Treaty of Peace, May 30, 1913, 218 Consol. T.S. 159; Treaty of Peace, July 28-Aug. 10, 1913, 218 Consol. T.S. 322.

81. See *supra* notes 71-74 and accompanying text.

82. Agreement Respecting Rights in Eastern Asia and India, Gr. Brit.-Japan, July 13, 1911, arts. 1-3, 5, 214 Consol. T.S. 107-08. See also 2 LANGER, *DIPLOMACY*, *supra* note 68, ch. 23. Japan's navy contributed appreciably to the Allied war effort in the Indian and Pacific Oceans and the Mediterranean Sea, where three destroyer flotillas operated under U.K. command. PAUL G. HALPERN, *A NAVAL HISTORY OF WORLD WAR I* 18-19, 75, 80, 82, 85, 90-91, 95-96, 372-73, 393 (1994).

83. KAGAN, *supra* note 22, at 128-29. But see TAYLOR, *supra* note 18, at 527-28.

84. Hague III, *supra* note 47, arts. 1, 3, 36 Stat. 2251. See also *supra* note 47 and accompanying text.

85. See generally PALMER, *supra* note 15, at 226-30; TAYLOR, *supra* note 18, at 520-30; BARBARA TUCHMAN, *THE GUNS OF AUGUST* 91-157 (1962).

86. TAYLOR, *supra* note 18, at 527-28.

87. Pact of Paris, *supra* note 11, arts. 1-2, 46 Stat. 2345-46, 94 L.N.T.S. 63. See also *infra* notes 136-52 and accompanying text.

88. See *supra* notes 61-63 and accompanying text.

89. Hague II, *supra* note 48, art. 1, 36 Stat. 2251; Hague III, *supra* note 47, arts. 1, 3, 36 Stat. 2271.

90. See *supra* notes 19, 24, 28, 41, 45, 61, 64-65, 67, 82 and accompanying text.

91. See *supra* notes 24-25, 28-42, 45, 56, 67-72, 75, 82 and accompanying text.

This is particularly true in the aftermath of the Napoleonic Wars, where the victors established a Congress system with a multilateral defense treaty incorporating consultation and anticipatory self-defense principles.⁹² The Crimean War illustrates a characteristic response to a regional conflict under this treaty. States opposing Russia agreed to conduct prior consultation and to try to contain the conflict by warning Russia, at least on paper, of consequences of expanding the war. Peripheral treaties, such as that with Sweden, were anticipatory in nature, warning Russia of consequences of wider action.⁹³ In a very rough sense, between the Congress and the Crimea systems, the forerunner of the treaty system in place since World War II emerged: an overarching instrument like the Charter,⁹⁴ regional multilaterals like the North Atlantic Treaty,⁹⁵ and bilaterals⁹⁶ elsewhere around the world.

The record for anticipatory self-defense in the pre-World War I treaties is mixed. Treaty drafters who included anticipatory self-defense provisions laid groundwork for state practice⁹⁷ and invoked the provisions as authority⁹⁸ for officials executing those treaties. Use of anticipatory self-defense provisions strengthened the view that anticipatory self-defense was a feature of international law before 1914.

II. The Covenant of the League of Nations and the Pact of Paris

The League of Nations Covenant and the 1928 Pact of Paris, also known as the Kellogg-Briand Pact, created the principal governing instruments of international security during the interwar years, 1920-39. These treaties, including the self-defense reservation to the Pact of Paris and other agree-

92. See *supra* notes 28-38 and accompanying text.

93. See *supra* note 34 and accompanying text.

94. See *infra* Parts III.A, III.B for analysis of self-defense in the Charter era.

95. North Atlantic Treaty, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243, *modified by* Protocol on Accession of Greece and Turkey, Oct. 17, 1951, 3 U.S.T. 43, 126 U.N.T.S. 350; Protocol on Accession of Federal Republic of Germany, Oct. 23, 1954, 6 U.S.T. 5707, 243 U.N.T.S. 308; Protocol on Accession of Spain, Dec. 10, 1981, 34 U.S.T. 3510 (analyzed *infra* notes 270-72 and accompanying text). In 1997, agreements were signed to admit the Czech Republic, Hungary, and Poland to Treaty membership, with perhaps other states to follow in a second round. The protocol was recently accepted by the U.S. Senate. Predictably, the Department of State promoted the expansion; others are critical of it. See generally U.S. Secretary of State Madeleine K. Albright, *NATO Expansion: Beginning the Process of Advice and Consent: Statement Before the Senate Foreign Relations Committee*, 8 U.S. Dep't St. Dispatch 1 (Oct. 1997) (favoring expansion); Madeleine K. Albright, *NATO Expansion: A Shared and Sensible Investment: Statement Before the Senate Appropriations Committee*, 8 U.S. Dep't St. Dispatch 12 (Nov. 1997) (same); MANDELBAUM, *supra* note 22, at 45-65, 156, 164, 173-74 (opposing expansion); Amos Perlmutter & Ted Galen Carpenter, *NATO's Expensive Trip East*, 77 FOREIGN AFF. 2 (1998) (same). On April 30, 1998, the Senate voted 80-19 to admit the Czech Republic, Hungary and Poland to NATO. See Steven Erlanger, *Key Senate Panel Passes Resolution to Broaden NATO*, N.Y. TIMES, Mar. 4, 1998, at A1; Eric Schmitt, *Senate Approves Expansion of NATO by Vote of 80-19; Efforts at Delay Defeated*, N.Y. TIMES, May 1, 1998, at A1.

96. See *infra* notes 305-15 and accompanying text.

97. See, e.g., *supra* note 25 and accompanying text.

98. Cf. 1945 I.C.J. 59 Stat. 1055, art. 38(1); RESTATEMENT (THIRD), *supra* note 62, §§ 102-03.

ments negotiated before World War II, along with the views of commentators, demonstrates that anticipatory collective self-defense remained a legitimate response under international law.

A. The Covenant of the League of Nations

The Covenant of the League of Nations, a part of the World War I peace treaties,⁹⁹ created treaty law that could be applied territorially¹⁰⁰ to League Members, their colonies, and their dependencies,¹⁰¹ thus covering significant portions of the world from 1920 through 1945. Major exceptions include Germany (Member 1926-33); Japan (Member 1920-33); USSR (Member 1934-39); and the United States (never a Member).¹⁰²

The Covenant's relatively weak principles for regulating the use of force did not address self-defense issues directly. Its preamble directed its members "to achieve international peace and security . . . accept . . . obligations not to resort to war . . . [and] Agree to [the] Covenant. . . ."¹⁰³ Covenant article 10 provided:

. . . Members . . . undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members In case of any such aggression or in case of any threat or danger of such aggression the Council shall advise upon the means by which this obligation shall be fulfilled.¹⁰⁴

The Council included the Principal Allied and Associated Powers from World War I — France, Great Britain, Italy, and Japan — and four more League Members.¹⁰⁵ Article 11 provided for League action in case of war or threat of war:

99. See F.P. WALTERS, *A HISTORY OF THE LEAGUE OF NATIONS* ch. 4 (1952) for analysis of drafting of the Covenant. See also *supra* note 10 and accompanying text.

100. Vienna Convention on the Law of Treaties, May 23, 1969, art. 29, 1155 U.N.T.S. 331, 339 [hereinafter Vienna Convention] (restating customary rule that unless a different intention appears from a treaty or is otherwise established, a treaty binds a party as to all its territory)); IAN SINCLAIR, *THE VIENNA CONVENTION ON THE LAW OF TREATIES* 89-92 (2d ed. 1984); RESTATEMENT (THIRD), *supra* note 62, § 322 & r.n. 2 (noting colonial empires' practice to specify territorial application).

101. LEAGUE OF NATIONS COVENANT art. 1, provided that original Members were states signatory to the Treaty of Versailles, *supra* note 10, of which the Covenant was Part I, and other states named in the Covenant Annex, for example, countries like the Netherlands neutral during the war. Other states, dominions or colonies could join if the Assembly approved. See WALTERS, *supra* note 99, at 43-44. For the Assembly's function, see *infra* notes 111-14 and accompanying text. The United States signed the Treaty of Versailles, but the Senate never gave advice and consent. See WALTERS, *supra*, ch. 6; *supra* note 10 and accompanying text.

102. Costa Rica, an original Member, withdrew in 1925, and Brazil and Spain in 1926. WALTERS, *supra* note 99, at 68-72, 316-27, 495-97, 550, 565, 579-85, 768, 782-83, 806-08.

103. LEAGUE OF NATIONS COVENANT art. 4(1).

104. *Id.* art. 10.

105. *Id.* For President Woodrow Wilson, article 10 was the Covenant's key provision. KAGAN, *supra* note 22, at 299; WALTERS, *supra* note 99, at 48-49. The United States was also mentioned but never joined the League. See *supra* notes 10, 101 and accompanying text.

1. Any war or threat of war, whether immediately affecting any . . . Members . . . or not, is . . . declared a matter of concern to the whole League, and [it] shall take any action . . . deemed wise and effectual to safeguard the peace of nations. [If] any such emergency should arise the Secretary General shall on the request of any Member . . . forthwith summon a meeting of the Council.

2. It is also . . . the friendly right of each Member . . . to bring to the attention of the Assembly or . . . Council any circumstance whatever affecting international relations which threatens to disturb international peace or the good understanding between nations upon which peace depends.¹⁰⁶

The Assembly included representatives of all Members; the Secretary-General had functions similar to the U.N. Secretary-General.¹⁰⁷ Members also agreed to resolve disputes by arbitration, judicial settlement, or resolution by the Council or the Assembly.¹⁰⁸ If a Member resorted to war in disregard of these covenants, it was "*ipso facto* . . . deemed to have committed an act of war against all other Members," thereby triggering economic and even military sanctions, if recommended by the Council.¹⁰⁹ The offending Member could not invoke treaties it did not register with the League, and the Assembly was charged with examining registered agreements for risks to peace.¹¹⁰ The Covenant was silent on options if the Council did not recommend action, or if it did and Members failed to comply.

The similarity to articles 1(1) and 2(4) of the Charter in Covenant articles 10 and 11 regarding threats to the peace or threats against any state are noteworthy:

Article 1

The Purposes of the United Nations are:

1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace and for the suppression of acts of aggression or other breaches of the peace

Article 2

The Organisation and its Members, in pursuit of the purposes . . . in Article 1, shall act in accordance with the following principles: . . .

4. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.¹¹¹

106. LEAGUE OF NATIONS COVENANT art. 11.

107. *Id.* arts. 3, 6, 11. See also U.N. CHARTER arts. 97-101; GOODRICH ET AL., *supra* note 5, ch. 15; WALTERS, *supra* note 99, at 44-47, 49.

108. LEAGUE OF NATIONS COVENANT arts. 12-13, 15. See also WALTERS, *supra* note 99, at 49-53.

109. LEAGUE OF NATIONS COVENANT arts. 16(1)-16(2). See also WALTERS, *supra* note 99, at 53.

110. LEAGUE OF NATIONS COVENANT arts. 18-19, which countered treaty terms of the previous era, which often enjoined secrecy on parties. See also WALTERS, *supra* note 99, at 54-55; *supra* note 62 and accompanying text.

111. U.N. CHARTER arts. 1(1), 2(4). Cf. LEAGUE OF NATIONS COVENANT arts. 10-11.

Besides safeguarding Members' territorial integrity against external aggression, Covenant article 10 also referred to "threat or danger of such aggression."¹¹² Under article 11(1), "war or threat of war, whether immediately affecting" a Member was declared a League concern, and the League could take "any action" deemed wise and effectual to safeguard the peace of nations.¹¹³ Article 11(2) allowed a Member to bring forward "any circumstance whatever affecting international relations which threatens to disturb international peace"¹¹⁴

The Covenant drafters thus considered more than war declarations or outbreak of war. The Covenant, like the Charter a quarter century later, contemplated action against threats or dangers of aggression, threats of war, or "any circumstance whatever . . . threatening to disturb international peace."¹¹⁵ Article 16(1) declared that a Member's resort to war in violation of certain Covenant obligations would automatically result in that Member's action being "deemed . . . an act of war against all other Members"¹¹⁶ Under treaty interpretation canons,¹¹⁷ the Covenant, weak as it was in terms of enforcement, contemplated collective action to counter hostile intent and hostile action.

Although the Covenant did not mention individual or collective self-defense, other Treaty of Versailles provisions prohibited Germany from maintaining or fortifying certain parts of the banks of the Rhine.¹¹⁸ Maintaining armed forces, permanently or temporarily stationed there, or permanent mobilization works, was also forbidden.¹¹⁹ If Germany violated these provisions, she would "be regarded as committing a hostile act against the Powers signatory [to] the . . . Treaty and as calculated to disturb the peace of the world."¹²⁰ This constitutes a statement of a potential for anticipatory collective self-defense. Unratified bilateral agreements between France and the United States, and France and Great Britain, confirm this view.¹²¹ These agreements called for Great Britain and the United States to come immediately to the aid of France if Germany com-

112. LEAGUE OF NATIONS COVENANT art. 10.

113. *Id.* art. 11, ¶ 1.

114. *Id.* art. 11, ¶ 2.

115. *Id.*

116. *Id.* art. 16, ¶ 1.

117. Vienna Convention, *supra* note 100, art. 31(1), 1155 U.N.T.S. at 340 (treaty interpreted in good faith in accordance with ordinary meaning given terms in their context and in light of its object and purpose). See also RESTATEMENT (THIRD), *supra* note 62, § 325(1); Eduardo Jimenez de Arechaga, *International Law in the Past Third of a Century*, 159 R.C.A.D.I. 1, 42-48 (1978).

118. Treaty of Versailles, *supra* note 10, 42 Stat. 1939.

119. *Id.*

120. *Id.* arts. 42-44, 225 Consol. T.S. at 213.

121. Agreement Providing for Assistance to France in the Event of Unprovoked Aggression by Germany, June 28, 1919, Fr.-U.S., arts. 1-2, 112 Brit. & For. St. Pap. 216-17, 13 AM. J. INT'L L. 411-13 (Supp. 1919) [hereinafter Agreement Providing U.S. Assistance to France]; Agreement for Assistance to France in the Event of Unprovoked Aggression by Germany, June 28, 1919, Fr.-Gr. Brit., arts. 1-2, 112 Brit. & For. St. Pap. 213-14, 13 AM. J. INT'L L. 414-15 (Supp. 1919) [hereinafter Agreement Providing British Assistance to France] (signed the same day as Treaty of Versailles, *supra* note 10).

mitted "any unprovoked movement of aggression against her."¹²² Because these agreements came into effect only if Britain and the United States ratified respective bilaterals with France, U.S. failure to ratify the Treaty¹²³ torpedoed the bilaterals, including the France-U.K. agreement that was ratified by Britain and thus was in force.¹²⁴ Nevertheless, use of troop "movement" limitations in these treaties, and the Versailles Treaty language, proves that the treaty drafters considered anticipatory collective self-defense action as an option. Available evidence of the secret military convention between France and Poland (1921)¹²⁵ suggests that it, too, contemplated anticipatory self-defense, as did the France-Czechoslovakia alliance (1924).¹²⁶ In contrast, eastern European states' alliances, which created the Little Entente, only provided for reactive self-defense.¹²⁷

In 1931, League Assembly reports, including one officially adopted by the Assembly, confirmed that the Covenant's prohibition on recourse to war did not exclude legitimate self-defense.¹²⁸ Principal League Members

122. Agreement Providing British Assistance to France, *supra* note 121, art. 1, at 415; Agreement Providing U.S. Assistance to France, *supra* note 121, preamble, at 411-12.

123. See *supra* notes 10, 101-05 and accompanying text.

124. KAGAN, *supra* note 22, at 297-98; George A. Finch, *A Pact of Non-Aggression*, 27 AM. J. INT'L L. 525, 526 (1933). LEAGUE OF NATIONS COVENANT art. 21, also provided that nothing in the Covenant would be deemed to affect "validity of international agreements, such as treaties of arbitration or regional understandings like the Monroe Doctrine, for securing the maintenance of peace." Article 21 was inserted to try to assure U.S. Senate passage of the Treaty of Versailles, *supra* note 10. WALTERS, *supra* note 99, at 55-56. President Wilson and British Prime Minister David Lloyd George agreed, in exchange, to the treaties, see *supra* note 121, that pledged aid to France if Germany attacked her again. Latin American states were not happy with the Monroe Doctrine reference. *Id.*

125. Secret Military Convention, Feb. 21, 1921, Fr.-Pol., art. 1, reprinted in J.A.S. GRENVILLE, *THE MAJOR INTERNATIONAL TREATIES 1914-45*, at 116 (1987).

126. Treaty of Alliance, Jan. 21, 1924, Czech.-Fr., arts. 1-2, reprinted in GRENVILLE, *supra* note 125, at 117. See also Political Agreement, Feb. 19, 1921, Fr.-Pol., reprinted in GRENVILLE, *supra* note 125, at 116. These agreements were modified by revised alliances (1925) negotiated in connection with Treaty of Mutual Guarantee, Oct. 16, 1925, 54 L.N.T.S. 289 [hereinafter Locarno Treaty], analyzed *infra* at notes 130-35 and accompanying text. See also KAGAN, *supra* note 22, at 390.

127. See, e.g., Convention of Alliance, Aug. 14, 1920, Czech.-Yugo., art. 1, 6 L.N.T.S. 209, 211; Treaty of Alliance, Apr. 23, 1921, Czech.-Rom., art. 1, 13 L.N.T.S. 231, 233; Convention of Defensive Alliance, June 7, 1921, Rom.-Yugo., art. 1, 54 L.N.T.S. 257, 259 (collective self-defense from "unprovoked attack"; also providing for consultation); THEODORE I. GESHKOFF, *BALKAN UNION: A ROAD TO PEACE IN SOUTHEASTERN EUROPE* 62-63 (1940) (arguing that the Little Entente's weakness was that it did not provide for defense to unprovoked attack by a great power); GRENVILLE, *supra* note 125 (Entente designed to maintain the Treaties of Neuilly and Trianon, *supra* note 10.). France and Italy also negotiated treaties with Entente states. See GRENVILLE, *supra* note 125, at 114-15; L.S. STAVRIANOS, *BALKAN FEDERATION* 227 (1964).

128. See 12 League of Nations O.J. 147-49 (1931) (adopting *General Convention to Improve the Means of Preventing War: Report of the Third Committee to the Assembly*, League of Nations Doc. A.77.1931.IX (1931), Annex 24, 24(a), 12 League of Nations O.J. 237-38, 241); Third Committee, *Draft Report to the Assembly*, League of Nations Doc. A.III.17.1931.IX (1931), Annex 3, 12 League of Nations O.J. Spec. Supp. 59-60 (1931); First Committee Minutes, 12 League of Nations O.J. Spec. Supp. 94, at 21-41, 73-74 (1931) (adopting *Amendment of the Covenant of the League of Nations in Order to Bring It into Harmony with the Pact of Paris*, Annex 18, 12 League of Nations O.J. Spec. Supp. 94, at 145, 146). See also 12 League of Nations O.J. Spec. Supp. 94, at 75, *Obser-*

rejected a proposed Treaty of Mutual Guarantee that was open to all states, whereby any party attacked would receive immediate, effective assistance from other parties in the same part of the world, and the Protocol of Geneva, which would have branded any state choosing war over arbitration of a dispute as the aggressor, unless the Council decided otherwise.¹²⁹ The right of self-defense became more explicit in reservations to the Pact of Paris and in the authoritative interpretation of it.¹³⁰

B. Locarno, the Pact of Paris, the Budapest Articles and Other Treaties

In 1925, five powers – Belgium, France, Germany, Great Britain, and Italy – signed the Locarno Treaties. Belgium and Germany, and France and Germany, pledged that they would not attack or invade each other, or resort to war against each other. This core Treaty of Mutual Guarantee stated two exceptions for these undertakings: “legitimate defense” and action by the parties to settle a conflict or stop an aggressor if the League did not. Legitimate defense was defined as “resistance to a violation of the undertaking” not to attack or invade, or resistance to flagrant breach of the Versailles Treaty’s demilitarization provisions, “if such breach constitutes an unprovoked act of aggression and by reason of the assembly of armed forces in the demilitarized zone immediate action is necessary.”¹³¹ The Locarno treaties also “created a system in the nature of collective self-defense.”¹³² The parties pledged “collectively and severally [to] guarantee . . . maintenance of the territorial *status quo* [of] . . . frontiers between Germany and Belgium and between Germany and France, and the inviolability of the said frontiers as fixed by” the Versailles Treaty.¹³³ The parties agreed to provide immediate assistance to the target state.¹³⁴ To the extent that the Locarno parties agreed to act collectively for flagrant breaches of the Versailles Treaty, Locarno could be said to restate anticipatory collective self-defense, in that failure to maintain a demilitarized area or demilitarized status could be deemed a hostile threat to other states permitting

vations Submitted by Governments, League of Nations Doc. A.11.1931.V (1931); *Precis of the Observations Submitted by the Governments Since the Assembly of 1930*, 12 League of Nations O.J. Spec. Supp. 94, at 92; ALEXANDROV, *supra* note 1, at 37.

129. See KAGAN, *supra* note 22, at 307; WALTERS, *supra* note 99, at 223-27, 267-76, 283-85, 288, 291, 362, 384, 710.

130. See *infra* notes 136-52, 238-48 and accompanying text.

131. Locarno Treaty, *supra* note 126, art. 2, 54 L.N.T.S. at 293. See also ALEXANDROV, *supra* note 1, at 44-47; BOWETT, *supra* note 1, at 127-29; KAGAN, *supra* note 22, at 308-15, 335, 355-57, 378; WALTERS, *supra* note 99, at 285-94, 692-98 (German denunciation of Locarno, 1936); C.G. Fenwick, *The Progress of Cooperative Defense*, 24 AM. J. INT’L L. 118, 120 (1930) (France concluded guarantee treaties “of the old type” with Czechoslovakia and Poland besides signing Locarno Treaties); C.G. Fenwick, *The Legal Significance of the Locarno Agreements*, 20 AM. J. INT’L L. 108 (1926); Finch, *supra* note 124, at 727-28 (failure of multilateral 1924 Treaty of Mutual Assistance); Quincy Wright, *The Munich Settlement and International Law*, 33 AM. J. INT’L L. 12, 18 (1939) (German denunciation of Locarno).

132. ALEXANDROV, *supra* note 1, at 45.

133. Locarno Treaty, *supra* note 126, art. 1, 54 L.N.T.S. at 293.

134. A party claiming a violation had to bring the case to the League. *Id.* art. 4, 54 L.N.T.S. at 293.

collective action. Although only five countries were formal parties, when their colonial empires and associated states are considered, Locarno's territorial scope was quite large.¹³⁵

Parties to the Pact of Paris (1928) renounced war as an instrument of national policy, agreeing to settle disputes by pacific means.¹³⁶ The Pact is still in force, though partly superseded by the Charter,¹³⁷ with sixty-nine signatures by 1997.¹³⁸ Further, treaty succession principles may apply it to more states.¹³⁹ The Pact's principles became part of the Nuremberg Charter¹⁴⁰ and Judgment;¹⁴¹ they were also affirmed as customary international law by unanimous U.N. General Assembly Resolution 95(1).¹⁴²

Although the Pact did not address self-defense, an understanding, which was promoted by the United States¹⁴³ and to which fourteen major

135. *Id.* art. 9, 54 L.N.T.S. at 297. Article 9 specifically exempted the British Dominions and India from any obligations under the treaty unless they assented. However, the treaty said nothing about the then-extensive Belgian, French or Italian possessions or other British colonies. Cf. Vienna Convention, *supra* note 100, art. 29, 1155 U.N.T.S. at 339. See also WALTERS, *supra* note 99, ch. 24 (analyzing the Locarno treaties in the context of the Covenant). Germany ended the arrangement in 1936 by denouncing the Treaty. WALTERS, *supra*, at 692-98; Wright, *The Munich*, *supra* note 131.

136. Pact of Paris, *supra* note 11, arts. 1-2, 46 Stat. at 2345-46, 94 L.N.T.S. at 63. See generally FERRELL, *supra* note 47, at 66-191; DAVID HUNTER MILLER, *THE PEACE PACT OF PARIS: A STUDY OF THE BRIAND-KELLOGG TREATY 7-120 (1928)* (providing negotiating history). French Foreign Minister Aristide Briand reading CARL VON CLAUSEWITZ, *ON WAR* (Michael Howard & Peter Paret ed. & trans. 1976) may have inspired the Pact. FERRELL, *supra*, at 66.

137. U.N. CHARTER art. 103. See also Vienna Convention, *supra* note 100, art. 30(1), 1155 U.N.T.S. at 339; RESTATEMENT (THIRD), *supra* note 62, § 102 cmt. h, 323 cmt. b; SINCLAIR, *supra* note 100, at 94-98, 184-85.

138. UNITED STATES DEPARTMENT OF STATE, *TREATIES IN FORCE* 430-31 (1997) [hereinafter TIF].

139. See generally Symposium, *State Succession in the Former Soviet Union and in Eastern Europe*, 33 VA. J. INT'L L. 253 (1993); Walker, *Integration and Disintegration*, *supra* note 51, at 43.

140. Agreement for Prosecution and Punishment of Major War Criminals of the European Axis, Aug. 8, 1945, art. 2, 59 Stat. 1544-45, 82 U.N.T.S. 280, 282, annexing Charter of International Military Tribunal, art. 6, 59 Stat. 1546, 1547, 82 U.N.T.S. at 286-88 [hereinafter Nuremberg Charter].

141. *United States v. Goering*, 1 Tr. Maj. War Crim. Before Int'l M. Trib. 171, 218-22 (1947), 41 AM. J. INT'L L. 172, 216 (1947) [hereinafter Nuremberg Judgment]. See also McDOUGAL & FELICIANO, *supra* note 1, at 531, 533.

142. G.A. Res. 95(1), U.N. GAOR, 1st Sess., U.N. Doc. A/236, at 1144 (1946). The International Law Commission reiterated principles of the Pact, the Judgment, and the Resolution. See International Law Commission, *Formulation of the Nurnberg Principles*, 2 Y.B. INT'L L. COMM'N 193, 195 (1950). See also discussion *infra* notes 238-48 and accompanying text (providing further analysis of the war crimes trials and the 1946 Assembly resolution). 2 OPPENHEIM, *supra* note 1, § 52fh, at 183, says resort to war is lawful as between Pact parties and non-parties, and presumably a fortiori between two states that are not Pact parties. But see *supra* notes 139-41, *infra* notes 238-48 and accompanying text (noting that principles of treaty succession and acceptance of Pact principles as a general customary norm makes this claim dubious today).

143. Multilateral Treaty for Renunciation of War: Identical Notes of the Government of the United States to the Governments of Australia, et al., June 23, 1928, 22 AM. J. INT'L L. 109 (1928). See also MILLER, *supra* note 136, at 80-98; WALTERS, *supra* note 99, at 385-86.

signatories including the colonial powers¹⁴⁴ agreed,¹⁴⁵ stated that the treaty did not affect the "inalienable" right of self-defense. The notes exchanged between these major signatories were "an authentic and binding commentary on and interpretation of the . . . Treaty."¹⁴⁶ Although the diplomatic correspondence made no specific reference to anticipatory self-defense or collective self-defense, Great Britain nonetheless broadly claimed that:

[T]here are certain regions . . . the welfare and integrity of which constitute a special and vital interest for our peace and safety. His Majesty's Government have been at pains to make it clear in the past that interference with these regions cannot be suffered. Their protection against attack is to the . . . Empire a measure of self-defense. It must be clearly understood that . . . Britain accept[s] the new treaty upon the distinct understanding that it does not prejudice their freedom of action in this respect.¹⁴⁷

Britain was referring to its Empire, Egypt and the Persian Gulf.¹⁴⁸ A few states objected to the British note. For example, the USSR stated that "the result would be that there would probably be no place left . . . where the Pact could be applied."¹⁴⁹ Since the Commonwealth system included colo-

144. The result was that the Pact applied to most of the Earth's territory. Cf. Vienna Convention, *supra* note 100, art. 29, 1155 U.N.T.S. at 339; *supra* note 100 and accompanying text.

145. See 1928(1) FOR. RELS. U.S. 107-24 (1942). See also telegram of U.S. Secretary of State Frank B. Kellogg to Myron T. Herrick, U.S. Ambassador to France, June 20, 1928 in 1928(1) FOR. RELS. U.S. 90, 91. Secretary Kellogg had made nearly verbatim but unofficial comments on April 23, 1928, at the annual meeting of the American Society of International Law. *Address of the Honorable Frank B. Kellogg*, 1928 PROC. AM. SOC'Y INT'L L. 141, 143. Other contemporaries analyzed the Pact in this context. See generally FERRELL, *supra* note 47, at 170-191; MILLER, *supra* note 136, at 83-85, 102, 104, 106, 109, 114, 123, 280; Edwin M. Borchard, *The Multilateral Treaty for the Renunciation of War*, 23 AM. J. INT'L L. 116 (1929); Henry M. Stimson, *The Pact of Paris: Three Years of Development*, 11 FOREIGN AFF. i, v (Special Supp. Oct. 1932). The international academic community as well as the diplomats clearly understood the Pact and the self-defense reservation. See also Louis B. Sohn, *The International Court of Justice and the Scope of the Right of Self-Defense and the Duty of Non-Intervention*, in INTERNATIONAL LAW AT A TIME OF PERPLEXITY: ESSAYS IN HONOUR OF SHABTAI ROSENNE 869, 872-75 (Yoram Dinstein ed., 1988).

146. FERRELL, *supra* note 47, at 193-200; 3 INTERNATIONAL LAW CHIEFLY AS INTERPRETED BY THE UNITED STATES 1683 (Charles Cheney Hyde ed., 1945); McDUGAL & FELICIANO, *supra* note 1, at 141; MILLER, *supra* note 136, at 110-11; 2 OPPENHEIM, *supra* note 1, §§ 52fh, 52g; see also ALEXANDROV, *supra* note 1, at 58. But see Quincy Wright, *The Interpretation of Multilateral Treaties*, 23 AM. J. INT'L L. 94, 104, 106 (1929); Quincy Wright, *The Meaning of the Pact of Paris*, 27 AM. J. INT'L L. 39, 43 (1933). The notes debate continued in the U.S. Senate. FERRELL, *supra* note 47, at 300-10.

147. Note of U.K. Ambassador Houghton to Secretary of State Kellogg, May 19, 1928, 1928(1) FOR. RELS. U.S. 66, 68 (1942).

148. See ALEXANDROV, *supra* note 1, at 55-56; FERRELL, *supra* note 47, at 179-81; MILLER, *supra* note 136, at 68-69, 117-18, 121-22; WALTERS, *supra* note 99, at 385-86; Borchard, *supra* note 145, at 118.

149. Note of Soviet Acting Commissar for Foreign Affairs Maxim Litvinov to French Ambassador to Russia Herbet, Aug. 31, 1928, 1928(1) FOR. RELS. U.S. 170, 174 (1942). Four or five other countries objected to inclusion of any reservations, such as either the British or the U.S. reservations. See, e.g., Note of Egyptian Minister for Foreign Affairs H. Afifi to U.S. Charge' d'Affaires Winship, Sept. 3, 1928, FOR. RELS. U.S. 183, 184; Note of Turkey's Minister for Foreign Affairs to U.S. Ambassador Joseph C. Grew, Sept. 6,

nies, self-governing Dominions, India, and the Irish Free State,¹⁵⁰ the note may have reserved a right of self-defense for Britain to defend units of the Commonwealth and the Empire. Covenant provisions allowing League membership for colonies and Dominions¹⁵¹ underscored a potential for collective self-defense based on these relationships.

The U.S. note, to which states had responded in general agreement, spoke of the "inherent" and "inalienable" right of self-defense.¹⁵² That this continued the prior law, which included rights of anticipatory self-defense and collective self-defense, was apparent from treaties, state practice, and judicial decisions between 1928 and World War II.

The Little Entente of Balkan states, following the bilateral self-defense treaties in 1921,¹⁵³ negotiated its Pact of Organization in 1930.¹⁵⁴ The Entente declared that its governing Council's common policy was inspired by, *inter alia*, the Covenant, the Pact of Paris, and the Locarno Treaties; the 1921 treaties were renewed indefinitely.¹⁵⁵ Since the Pact incorporated the Pact of Paris with its widely accepted self-defense reservation, the presumption is that the Entente accepted the concept in its self-defense considerations. That the Entente may have contemplated anticipatory self-defense among its response options is further evidenced by its agreement with other countries in the region, which pledged reaction to "aggression,"¹⁵⁶ without defining this term.¹⁵⁷ Whether aggression meant more, such as

1928, FOR. RELS. U.S. 195, 196. BROWNIE, *USE OF FORCE*, *supra* note 1, at 244, says Afghanistan and Persia raised similar objections. MILLER, *supra* note 136, at 122, n.1 also mentions Hungary. Objections to reservations today would apply only to states raising them and the reserving state. Vienna Convention, *supra* note 100, arts. 19-23, 1155 U.N.T.S. at 337-38; Reservations to Convention on Prevention & Punishment of Crime of Genocide, 1951 I.C.J. 15 [hereinafter Genocide Reservations Case]; IAN BROWNIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 608-11 (4th ed. 1990); T.O. ELIAS, *THE MODERN LAW OF TREATIES* 27-36 (1974); LORD MCNAIR, *THE LAW OF TREATIES* 158-71 (2d ed. 1961); 1 OPPENHEIM'S INT'L L., *supra* note 1, §§ 614-19; RESTATEMENT (THIRD), *supra* note 62, § 313; SINCLAIR, *supra* note 100, at 13, 51-82 (Vienna Convention, *supra* note 100, arts. 19-23, 1155 U.N.T.S. at 337-38, represent progressive development); D.W. Bowett, *Reservations to Non-Restricted Multilateral Treaties*, 48 BRIT. Y.B. INT'L L. 67, 88-90 (1976); J.M. Ruda, *Reservations to Treaties*, 146 R.C.A.D.I. 95 (1975).

150. See generally J.E.S. FAWCETT, *THE BRITISH COMMONWEALTH IN INTERNATIONAL LAW* (1963); States: British Commonwealth, 1 Whiteman DIGEST § 30.

151. See *supra* note 101 and accompanying text.

152. U.S. Note of April 23, 1928, 1928(1) FOR. RELS. U.S. 34, 36-37 (1942). See also *supra* notes 143-46 and accompanying text.

153. See *supra* note 127 and accompanying text.

154. Pact of Organisation of the Little Entente, Feb. 16, 1933, 139 L.N.T.S. 233.

155. *Id.* arts. 10-11, 139 at 239 (citing *inter alia* LEAGUE OF NATIONS COVENANT); Locarno Treaty, *supra* note 126; Pact of Paris, *supra* note 11; Alliance, Apr. 23, 1921, Czech-Rom., *supra* note 127; Alliance, June 7, 1921, Rom.-Yugo., *supra* note 127; Alliance, Aug. 31, 1922, Czech-Yugo., reprinted in NORMAN J. PADEFORD, *PEACE IN THE BALKANS* 183 (1935).

156. Treaty of Mutual Guarantee, Feb. 9, 1934, 153 L.N.T.S. 153, 157; Protocol, Feb. 9, 1934, arts. 1, 3, 153 L.N.T.S. 157.

157. See GRENVILLE, *supra* note 125, at 115; *supra* notes 125-26 and accompanying text (noting that the original 1921 agreements pledged joint reaction to "unprovoked attack"). See also GESHKOFF, *supra* note 127, chs. 5-12; PADEFORD, *PEACE*, *supra* note 155, chs. 1-4 for history of negotiations.

action short of attack, is not clear. However, the fact that it cited the Pact of Paris indicates that the Entente accepted anticipatory self-defense as a response option if it was part of that inherent right.

Although not formed specifically for the purpose, the Pan American Union¹⁵⁸ was in place in 1936 when the Western Hemisphere states, including the United States, negotiated agreements to "supplement and reinforce" League efforts to prevent war.¹⁵⁹ The Union's members, besides reaffirming prior treaty obligations to settle international controversies between them by peaceful means, also agreed, subject to member obligations under the Covenant, to consult when there was a threat of war among them. The obligations arising under the Pact of Paris were among those confirmed.¹⁶⁰ While these treaties, which are still in force,¹⁶¹ do not cover a Union country's war with a state outside the Americas, in reaffirming the Pact of Paris and its self-defense reservation,¹⁶² they reinforce that law.

The 1937 Nyon Arrangement and the Supplemental Agreement¹⁶³ declared that parties would defend merchant shipping and civil aircraft of any state attacked by surface ships, aircraft, or submarines in parts of the Mediterranean Sea.¹⁶⁴ The Arrangement announced that a submarine attacking vessels contrary to the 1930 London Naval Armaments Treaty and its 1936 Protocol¹⁶⁵ would be attacked and possibly destroyed. It also said that parties' forces would attack

any submarine encountered in the vicinity of a position where a ship not belonging to either . . . conflicting Spanish parties [in the Spanish civil war] ha[d] recently been attacked in violation of the rules . . . in circumstances

158. Pan American Union, Apr. 14, 1890, Jan. 29, 1902, Aug. 11, 1910, 1 BEVANS 129, 344, 752. See also *infra* note 257 and accompanying text.

159. Convention for Maintenance, Preservation and Reestablishment of Peace, Dec. 23, 1936, preamble, 51 Stat. 15 [hereinafter Peace Convention]. See also Additional Protocol Relative to Non-intervention, Dec. 23, 1936, 51 Stat. 41.

160. Convention to Coordinate, Extend and Assure Fulfillment of Existing Treaties Between American States, Dec. 23, 1936, arts.1-7, 51 Stat. 116, 119-21 (citing Treaty to Avoid and Prevent Conflicts Between the American States, May 23, 1923, 44 Stat. 2527 (Gondra Treaty)); Pact of Paris, *supra* note 11; General Convention of Inter-American Conciliation, Jan. 5, 1929, 46 Stat. 2209; General Treaty of Inter-American Arbitration, Jan. 5, 1929, 49 Stat. 3153; Treaty of Non-Aggression and Conciliation, Oct. 10, 1933, 49 Stat. 3363 (Saavedra Lamas Treaty); Peace Convention, *supra* note 159. The Peace Convention also referred to the Pact of Paris, *supra* note 11.

161. TIF, *supra* note 138, at 414-15, 430-31.

162. See *supra* notes 143-52 and accompanying text.

163. Nyon Arrangement, *supra* note 74; Agreement Supplementary to the Nyon Arrangement, *supra* note 74. See also C. JOHN COLOMBOS, *THE INTERNATIONAL LAW OF THE SEA* § 472 (6th ed. 1967); NORMAN J. PADEFORD, *INTERNATIONAL LAW AND DIPLOMACY IN THE SPANISH CIVIL STRIFE* ch. 2 (1939); L.F.E. Goldie, *Commentary*, in NATALINO RONZITTI, *THE LAW OF NAVAL WARFARE: A COLLECTION OF AGREEMENTS AND DOCUMENTS WITH COMMENTARIES* 489 (1988).

164. See generally PADEFORD, *INTERNATIONAL*, *supra* note 163, ch. 2, App. XV; WALTERS, *supra* note 99, at 721, 725-26 for descriptions of attacks.

165. Treaty for Limitation and Reduction of Naval Armaments, Apr. 22, 1930, art. 22, 46 Stat. 2858, 2881-82, 112 L.N.T.S. 65, 88; Proces-Verbal Relating to Rules of Submarine Warfare Set Forth in Part IV of the Treaty of London of 22 April 1930, Nov. 6, 1936, 173 L.N.T.S. 353, 355-57. See also Edwin I. Nwogugu, *Commentary*, in RONZITTI, *supra* note 163, at 353.

which give valid grounds for the belief that the submarine was guilty of the attack.¹⁶⁶

Because of further submarine attacks on merchantmen, Nyon parties announced they would sink "any submarine found submerged" in Mediterranean Sea zones under their control.¹⁶⁷

The Arrangement as published and applied is an example of maritime anticipatory collective self-defense.¹⁶⁸ Nine states, several with no Mediterranean coastlines, agreed to protect shipping and aircraft. These states declared they would attack a submerged submarine near an attacked merchantman and later broadened the Arrangement coverage to include submarines found submerged in their patrol areas. In today's terminology, it would be said that a submarine's presence in the area is perceived as a manifestation of hostile intent, and the submarine is subject to a preemptive attack to eliminate it as a threat to merchant shipping. When states cooperated under the Arrangement to suppress submarine attacks, they acted in anticipatory collective self-defense.

In 1934, the International Law Association adopted the *Budapest Articles of Interpretation* of the Pact of Paris, which recited the following principles:

- (2) A signatory State which threatens to resort to armed force for the solution of an international dispute or conflict is guilty of a violation of the Pact.
- (3) A signatory State which aids a violating State thereby itself violates the Pact.
- (4) In the event of a violation of the Pact by a resort to armed force or war by one signatory State against another, the other States may, without thereby committing a breach of the Pact or any rule of International Law, do all or any of the following things:
 - (a) Refuse to admit the exercise by the State violating the Pact of belligerent rights, such as visit and search, blockade, etc.;
 - (b) Decline to observe towards the State violating the Pact the duties prescribed by International Law, apart from the Pact, for a neutral in relation to a belligerent;
 - (c) Supply the State attacked with financial or material assistance, including munitions of war;
 - (d) Assist with armed forces the State attacked.¹⁶⁹

Although some states and commentators noted that after approval no state adopted the *articles* as policy, it has been argued that the *articles* and the 1939 Harvard Draft Convention on Rights and Duties of States in Case of Aggression¹⁷⁰ legitimized 1939-41 U.S. aid to the Allies in World War II

166. Nyon Arrangement, *supra* note 74, ¶¶ 2-3, 181 L.N.T.S. at 137.

167. Goldie, *supra* note 163, at 494.

168. PADELFORD, INTERNATIONAL, *supra* note 163, at 49.

169. International Law Association, *Budapest Articles of Interpretation: Final Text*, arts. 2-4, in INTERNATIONAL LAW ASSOCIATION, REPORT OF THE 38TH CONFERENCE 66-67 (1934), reprinted in *Rights and Duties of States in Case of Aggression*, 33 AM. J. INT'L L. 819, 825-26 n.1 (Supp. 1939) [hereinafter *Budapest Articles*].

170. Harvard Draft Convention on Rights and Duties of States in Case of Aggression, 33 AM. J. INT'L L. 819, 819-43 (Supp. 1939). BOWETT, *supra* note 1, at 161, writing in

before the United States entered the conflict.¹⁷¹

Article 4(c) seemed to permit American aid to victims of German and Italian aggression.¹⁷² If article 4(c) supplied legal backbone for Lend-Lease and similar arrangements while the United States was not at war,¹⁷³ article 4(d) was a basis for collective self-defense and anticipatory self-defense in particular.¹⁷⁴ Besides aiding the Allies materially, the United States began escorting war-material convoys to the middle of the Atlantic Ocean, turning over escort duties to the Royal Navy and other allied forces at that point.¹⁷⁵ Such convoying led to clashes between the U.S. and German navies. The U.S.S. *Niblack* executed attacks when there was a submarine threat, the U.S.S. *Reuben James* was sunk, and the U.S.S. *Kearney* was damaged.¹⁷⁶ Although no text of the U.K.-U.S. arrangement has been published (perhaps because it was an oral agreement or due to national security considerations), undoubtedly there was some sort of arrangement between the two countries.¹⁷⁷ States do not send their navies into harm's way without agreeing on terms. If article 4(d) restated customary and general principles norms, it was proper for U.S. warships not only to respond to submarine attacks on them but also to anticipate attacks with appropriate force measures. Thus the United States could have invoked the principle stated in article 4(d) to assert a right of anticipatory self-defense against German submarine attacks. Since the United Kingdom and the United States had an informal arrangement, this would have been anticipatory collective self-defense.

C. Other Treaties Concluded Before and During World War II

Defense treaties signed before and during World War II support the concept of anticipatory collective self-defense. Because the League of Nations and its treaty registration and publication system collapsed,¹⁷⁸ the record

1958, said the Draft Convention's principles were *de lege ferenda*. Query whether he would have come to the same conclusion after the relatively full historical record of World War II had been available.

171. George K. Walker, *Maritime Neutrality in the Charter Era*, 17 ANN. PROC. U. VA. CENTER FOR OCEANS L. & POL. 124, 142-46 (1993). See also ROBERT E. SHERWOOD, ROOSEVELT AND HOPKINS: AN INTIMATE HISTORY chs. 10, 12 (1950 rev. ed.) for a U.S. and diplomatic history perspective on Lend-Lease.

172. *Budapest Articles*, *supra* note 169, art. 4(c).

173. *Id.*

174. *Id.* art. 4(d).

175. I SAMUEL ELIOT MORISON, HISTORY OF UNITED STATES NAVAL OPERATIONS DURING WORLD WAR II: THE BATTLE OF THE ATLANTIC: SEPTEMBER 1939-MAY 1943, at 56-113 (1947). President Franklin D. Roosevelt chose the line on July 11, 1941, by ripping a map out of a *National Geographic Magazine* and drawing a line for the U.S. Navy's policing area, which included seas east of Greenland and Iceland. SHERWOOD, *supra* note 171, at 308, 310-11. Executive agreements for protecting Greenland and Iceland had already been signed. See *infra* notes 194, 198-99 and accompanying text.

176. See MORISON, *supra* note 175, at 56-113.

177. See generally SHERWOOD, *supra* note 171, at 308, 310-11, which recounts details of the U.K.-U.S. arrangement, which was probably informal in nature. See also RESTATEMENT (THIRD), *supra* note 62, § 301 cmt. b & r.n. 4, § 312 r.n. 5.

178. See WALTERS, *supra* note 99, chs. 66-67.

of international agreements during 1935-45 is not complete. What is available supports a view that states believed treaties could provide for anticipatory collective self-defense.

The USSR's pacts with France and Czechoslovakia (1935) pledged mutual assistance if either party was subjected to "unprovoked aggression" and consultation if threatened with aggression.¹⁷⁹ The 1936 treaty with Mongolia followed the same pattern.¹⁸⁰ When war clouds loomed for the USSR in 1939 and the war had begun for other countries, Soviet treaties with Estonia and Latvia pledged that each would come to the other's assistance if there was "direct aggression or threat of aggression" (Estonia),¹⁸¹ or "direct attack or threat of attack" (Latvia).¹⁸²

British and French eleventh-hour bilateral mutual assistance treaties with Poland provided for reactive self-defense. Further, they pledged support and assistance if a European Power "clearly threatened," by "any action," "directly or indirectly," a party's independence, and that party "considered it vital to resist [such action] with its armed forces."¹⁸³

After France and Britain entered the war, they pledged aid to Turkey if it were involved in hostilities with a European power, or if an act of aggression were committed against it.¹⁸⁴ Turkey agreed to observe "at least a benevolent neutrality" if Britain or France were engaged in hostilities with a European power and would aid them if they became involved in hostilities because of guarantees given to Greece or Romania.¹⁸⁵ The parties also pledged mutual consultation.¹⁸⁶

The twenty-year USSR-U.K. alliance (1942) pledged collective self-defense after the war if these states again became involved in hostilities

179. Treaty of Mutual Assistance, May 2, 1935, Fr.-USSR, arts. 1-2, 167 L.N.T.S. 395, 404; Treaty of Mutual Assistance, May 16, 1935, Czech-USSR, arts. 1-2, 159 L.N.T.S. 347, 357. See also KAGAN, *supra* note 22, at 390.

180. Protocol of Mutual Assistance, May 2, 1935, Mong.-USSR, arts. 1-2, 140 Brit. & For. St. Pap. 666.

181. Pact of Mutual Assistance, Sept. 28, 1939, Est.-USSR, art. 1, 198 U.N.T.S. 223, 228.

182. Pact of Mutual Assistance, Oct. 5, 1939, Lat.-USSR, art. 1, 198 U.N.T.S. 381, 386. The USSR also negotiated a pact with Lithuania on Oct. 10, 1939. These agreements' real purpose was in other provisions, granting the USSR bases in these states. GRENVILLE, *supra* note 125, at 182-83, 201.

183. Agreement of Mutual Assistance, Aug. 25, 1939, Pol.-U.K., art. 2, 199 L.N.T.S. 57, 58. A Secret Protocol, Aug. 25, 1939, Pol.-U.K., arts. 1-2, reprinted in GRENVILLE, *supra* note 125, at 191, defined the Agreement's object as defense against Germany, included the Free City of Danzig within the meaning of contracting parties, and would include Belgium, Estonia, Latvia, Lithuania and the Netherlands once mutual assistance pacts with those states had been concluded. Protocol of Mutual Assistance, Sept. 4, 1939, Fr.-Pol., art. 1, reprinted in GRENVILLE, *supra* note 125, at 192, employed language similar to the Poland-U.K. agreement but did not append a secret protocol, insofar as research reveals. See also 1 WINSTON S. CHURCHILL, THE SECOND WORLD WAR 397 (1948); GRENVILLE, *supra* note 125, at 178-79; WALTERS, *supra* note 99, at 798-99.

184. Treaty of Mutual Assistance, Oct. 15, 1939, Fr.-Turk.-U.K., 200 L.N.T.S. 167. See also 1 CHURCHILL, *supra* note 183, at 551, 703 (explaining Turkey's fear of a Soviet attack); GRENVILLE, *supra* note 125, at 179-80.

185. Treaty of Mutual Assistance, *supra* note 184, art. 4, at 171.

186. *Id.* arts. 1-7, at 169-71.

with Germany or states associated with it.¹⁸⁷ France's alliance with the USSR had similar terms.¹⁸⁸ A USSR-U.K. alliance with Iran pledged to defend Iran from "all aggression on the part of Germany,"¹⁸⁹ presumptively contemplating only reactive self-defense.

In the Western Hemisphere, the 1939 Declaration of Panama,¹⁹⁰ negotiated while the American states were not at war, asserted that:

As a measure of continental self-protection, the American Republics, so long as they maintain their neutrality, are as of inherent right entitled to have those waters adjacent to the American continent, which they regard as of primary concern and direct utility in their relations, free from the commission of any hostile act by any non-American belligerent . . . , whether such hostile act be attempted or made from land, sea or air.¹⁹¹

The Declaration applied these standards to a 300-mile zone off the American coasts.¹⁹² Although the zone may have been unlawful because it was not proportional in terms of territorial scope,¹⁹³ the important point for this analysis is that the Declaration asserted a collective claim to freedom from effects of "attempted" hostile acts. To that extent, the Declaration implicitly declared a right of anticipatory collective self-defense.

A 1941 Denmark-U.S. agreement for defending Greenland could also be said to be anticipatory in nature.¹⁹⁴ This treaty reaffirmed the existence

187. Treaty of Alliance in War Against Hitlerite Germany and Her Associates in Europe and of Collaboration and Mutual Assistance Thereafter, May 26, 1942, U.K.-USSR, arts. 3-4, 204 L.N.T.S. 353, 356. See also Agreement Providing for Joint Action in War Against Germany, July 12, 1941, U.K.-USSR, 204 L.N.T.S. 277; 4 CHURCHILL, *supra* note 183, at 335-36 (1950); GRENVILLE, *supra* note 125, at 204-06.

188. Treaty of Alliance and Mutual Assistance, Dec. 10, 1944, Fr.-USSR, arts. 1, 3-4, 149 Brit. & For. St. Pap. 632, 633-34. See also Treaty of Friendship and Mutual Assistance and Post-War Cooperation, Dec. 12, 1943, Czech-USSR, art. 3, 145 Brit. & For. St. Pap. 238, 239. This treaty can only be interpreted as applying to reactive measures, since it spoke of a party's involvement in a future war with Germany. Treaty of Friendship and Alliance, China-USSR, art. 3, reprinted in GRENVILLE, *supra* note 125, at 237, had similar terms for future war with Japan. See also GRENVILLE, *supra* note 125, at 226. The Agreement, July 30, 1941, Pol.-USSR, art. 3, 144 Brit. & For. St. Pap. 869, could only be regarded as a defensive alliance, since both states were then at war with Germany. See GRENVILLE, *supra* note 125, at 207, 209.

189. Treaty of Alliance, Jan. 29, 1942, art. 3(i), 36 AM. J. INT'L L. 175, 176 (Supp. 1942), 144 Brit. & For. St. Pap. 1017, 1018. See also GRENVILLE, *supra* note 125, at 204.

190. Declaration of Panama, *supra* note 13.

191. *Id.* ¶ 1, 3 BEVANS at 609.

192. *Id.*

193. Belligerents refused to recognize the zone. Panama Minister for Foreign Affairs Narciso Garay cable to U.S. Secretary of State Cordell Hull, Jan. 26, 1940, enclosing Statement on Behalf of the British Government, Statement on Behalf of the French Government, 1940(1) FOR. RELS. U.S. 689, 690, 693 (1959); Panama Ambassador Jorge E. Boyd cable to Secretary of State Hull, Feb. 16, 1940, enclosing note of German Charge d'Affaires Von Winter to Panama Minister for Foreign Affairs Garay, Feb. 14, 1940, 1940(1) FOR. RELS. U.S. 696. *Situation III: Contiguous Zones, Airplanes, and Neutrality*, in NAVAL WAR COLLEGE, INTERNATIONAL LAW SITUATIONS 1939, at 59, 80 (1940) concluded that the Declaration was not a part of international law. See also GRENVILLE, *supra* note 125, at 246-47; ROBERT W. TUCKER, THE LAW OF WAR AND NEUTRALITY AT SEA 224-26 (Nav. War C. Int'l L. Stud., v. 50, 1957).

194. When the agreement was signed, the United States was not at war, although Germany had overrun Denmark. Agreement Relating to Defense of Greenland, Apr. 7-9,

of a perceived threat to the Western Hemisphere as acknowledged in the 1940 Act of Havana, which was "considered, in effect, an act of self-defense by the American republics."¹⁹⁵ The Act created an emergency committee, pending ratification of a convention, empowered to act to assume governance of a belligerent's Western Hemisphere colony or possession that was "attacked" or "threatened." If "the need for emergency action [was] so urgent that action by the committee [could] not be awaited," an American republic, unilaterally or jointly, "[had] the right to act in the manner which its own defense or that of the continent require[d]."¹⁹⁶ This broad language recognized and left open a potential for anticipatory collective self-defense responses, particularly in view of authority given to make "urgent" responses to "threat[s]."¹⁹⁷

A similar U.S. agreement to defend Iceland in 1941 did not refer to the Act of Havana.¹⁹⁸ However, the president's response in this executive agreement to the effect that Iceland's defense was necessary to forestall a menace to Western Hemisphere security¹⁹⁹ might be construed as collective self-defense, anticipatory in nature. U.S. defense of Iceland would forestall menaces to American republics subject to the Act of Havana.

D. The Potential for Anticipatory Collective Self-Defense

When the Covenant, the Locarno Treaty, and the Pact of Paris as interpreted by the *Budapest Articles* are considered together, there is a strong argument for the view that they articulated the potential for anticipatory collective defense, albeit without precision. The Nyon Arrangement, and practice under it, was a clear example of anticipatory collective self-defense in action.²⁰⁰ The thrust of the Declaration of Panama and some international agreements before and during World War II were to the same effect. To be sure, the notion of self-preservation as equated with self-defense may

1941, Den.-U.S., art. 1, 55 Stat. 1245, 1246, 204 L.N.T.S. 135, 137, *terminated by Agreement*, Apr. 27, 1951, Den.-U.S., 2 U.S.T. 1485. *See also Agreement Relating to Defense of Greenland*, NAVAL WAR COLLEGE, INTERNATIONAL LAW DOCUMENTS 1940, at 202-13 (1942); *supra* note 169 and accompanying text.

195. Rights and Duties of States, 5 Whiteman DIGEST § 25, at 997, *referring to Act of Havana*, July 30, 1940, 54 Stat. 2491, *cited in Agreement Relating to Defense of Greenland*, *supra* note 194, art. 1, 55 Stat. at 1246, 204 L.N.T.S. at 127. *See also* GRENVILLE, *supra* note 125, at 247.

196. Act of Havana, *supra* note 195, 54 Stat. at 2502, 2504, *referring to Convention Respecting Provisional Administration of European Colonies and Possessions in the Americas*, July 30, 1940, 56 Stat. 1273. The Convention, a permanent treaty, partially superseded the Act, which was an executive agreement in U.S. practice but a treaty for other states; the Convention did not assert the self-defense rights stated in the Act. Nonetheless, it must be presumed that these provisions remained in effect, for they were cited by Agreement Relating to Defense of Greenland, *supra* note 194, art. 1, 55 Stat. at 1246. *See supra* notes 194-95 and accompanying text.

197. Act of Havana, *supra* note 195, 54 Stat. at 2502.

198. Agreement Relating to Defense of Greenland, *supra* note 194.

199. Agreement Respecting Defense of Iceland by United States Forces, July 1, 1941, 55 Stat. 1547, 1549-50, *terminated by Exchange of Notes*, Oct. 7, 1946, 61 Stat. 2426. *See also Defense of Iceland by United States Forces*, in NAVAL WAR COLLEGE, INTERNATIONAL LAW DOCUMENTS 1940, at 245-50 (1942); *supra* note 195 and accompanying text.

200. Nyon Arrangement, *supra* note 74, 181 L.N.T.S. 135.

have been discounted by then,²⁰¹ but an anticipatory collective self-defense claim remained admissible.

III. Drafting the Charter and Winding Up World War II

Research and drafting for a new international organization to replace the League of Nations began during World War II.²⁰² The U.N. Charter was signed during the last year of that war, with original Members' ratifications often coming after hostilities ended. Agreements to prosecute war criminals were also signed during the war (for example, the Nuremberg Charter, in 1945),²⁰³ but judgments came down years later. The U.N.'s beginnings are therefore necessarily intertwined with the end of the war and the war crimes trials.

Section A of this Part analyzes the drafting of the Charter as it relates to collective self-defense. Section B discusses the trials of the major war criminals as those proceedings relate to the issues of self-defense and anticipatory self-defense.

A. The Charter Drafting Process and Collective Self-Defense

The draft emerging from discussions and preparations for the San Francisco Charter conference did not provide for self-defense, then considered inherent in nature.²⁰⁴ The Act of Chapultepec, signed a month before the conference, provided for pledges of collective measures, including use of force, to meet threats or acts of aggression against a Western Hemisphere country.²⁰⁵ Like the interwar agreements and practice,²⁰⁶ the Act in effect declared a right to anticipatory collective self-defense.

To address the concerns of some Latin American states, the San Francisco conference included article 51 in the Charter.²⁰⁷ Although some argue that the Charter confers a new right of collective self-defense in arti-

201. McHugh, *supra* note 1, at 65.

202. See generally GOODRICH ET AL., *supra* note 5, at 1-12; RUTH B. RUSSELL, A HISTORY OF THE UNITED NATIONS CHARTER (1958); SIMMA, *supra* note 1, at 2-12.

203. Nuremberg Charter, *supra* note 140. See also *supra* notes 140-41, and *infra* notes 238-43 and accompanying text.

204. See generally ALEXANDROV, *supra* note 1, at 77-79; GOODRICH ET AL., *supra* note 5, at 44, 342-43; McCORMACK, *supra* note 1, at 153-57, 167-68; RUSSELL, *supra* note 202, at 456, 688-712.

205. Inter-American Reciprocal Assistance and Solidarity, Mar. 8, 1945, Parts I(3), I(4), II-III, 60 Stat. 1831, 1839-40 [hereinafter Act of Chapultepec]. See also Manuel S. Canyes, *The Inter-American System and the Conference of Chapultepec*, 39 AM. J. INT'L L. 504 (1945); Josef L. Kunz, *The Inter-American System and the United Nations Organization*, 39 AM. J. INT'L L. 758 (1945). The Act was superseded by Inter-American Treaty of Reciprocal Assistance, Sept. 2, 1947, 62 Stat. 1681, 21 U.N.T.S. 77 [hereinafter Rio Treaty], and the end of World War II. See also *infra* notes 255-62 and accompanying text.

206. See *supra* notes 190-96 and accompanying text.

207. See generally ALEXANDROV, *supra* note 1, at 80-93; BOWETT, *supra* note 1, at 182-83; BROWNLIE, *USE OF FORCE*, *supra* note 1, at 270-71; GOODRICH ET AL., *supra* note 5, at 342-44; RUSSELL, *supra* note 202, at 690-99; STOETZER, *supra* note 18, at 28; Kunz, *Inter-American System*, *supra* note 205.

cle 51,²⁰⁸ states had been practicing collective self-defense, or at least had stated such a right, in treaties long before the Charter was ratified. A related problem is whether there is a variant of self-defense apart from the standards of article 51. Most scholars say that there is no other inherent right apart from that stated by and developed under article 51.²⁰⁹ However, the *Nicaragua Case*, which held that a parallel customary norm bound the litigants when the Charter could not be applied,²¹⁰ may open a door to developing principles opposing Charter norms²¹¹ and possibly outweighing Charter principles.²¹²

Exercising a right of collective self-defense need not be pursuant to a multilateral arrangement; a country may assist another under a bilateral treaty or without any previous treaty or other arrangement. The *travaux préparatoires* for the Charter support this view:

[I]t is true that it was for purposes of fitting regional arrangements, and particularly the inter-American System, into the general international organization that article 51 was added at San Francisco. However, the discussions

208. See ALEXANDROV, *supra* note 1, at 95; 2 OPPENHEIM, *supra* note 1, § 52aa, at 155; Robert W. Tucker, *The Interpretation of War Under Present International Law*, 4 INT'L L.Q. 11, 29 (1951).

209. J.B. BRIERLY, *THE LAW OF NATIONS* 417 (Humphrey Waldock ed., 6th ed. 1963); BROWNIE, *USE OF FORCE*, *supra* note 1, at 271-72; GOODRICH ET AL., *supra* note 5, at 344; JESSUP, *supra* note 1, at 166-68; HANS KELSEN, *RECENT TRENDS IN THE LAW OF THE UNITED NATIONS* 913-14 (1961); D.W. Bowett, *Collective Self-Defense under the Charter of the United Nations*, 32 BRIT. Y.B. INT'L L. 130, 131 (1955); Arthur L. Goodhart, *The North Atlantic Treaty of 1949*, 79 R.C.A.D.I. 187, 192 (1951).

210. *Nicaragua Case*, 1986 I.C.J. 4, 94 (June 27). See also *id.* at 152-53 (sep. opin. of Singh, Pres.); Sohn, *supra* note 145, at 871.

211. These include, for example, self-defense principles to justify anti-terrorism and drug trafficking suppression. Geoffrey M. Levitt, *Intervention to Combat Terrorism and Drug Trafficking*, in *LAW AND FORCE*, *supra* note 1, at 224. Kolosov, *supra* note 1, at 234, proposed a treaty to define self-defense.

212. Cf. I.C.J. STATUTE, art. 38(1); RESTATEMENT (THIRD), *supra* note 62, §§ 102-03, emphasize that treaty law, for example, the Charter, must be balanced against customary norms, and that custom can develop contrary to treaty-based law and can outweigh treaty law. U.N. CHARTER art. 103 only applies to treaties inconsistent with the Charter. Moreover, *jus cogens* norms may outweigh custom or treaties. If a *jus cogens* norm develops on a track different from a Charter-based norm or a customary norm based on the Charter, *jus cogens* trumps either. On the other hand, if a Charter-based norm, whether a rule from the Charter as treaty or a parallel customary rule, is *jus cogens*, it trumps other standards. *Nicaragua Case*, 1986 I.C.J. at 100, held norms under U.N. CHARTER art. 2(4) approached *jus cogens* status, superseding contrary custom. At least one commentator has argued that the right to self-defense as a *jus cogens* norm may be presumed. Carin Kahgan, *Jus Cogens and the Inherent Right to Self-Defense*, 3 ILSA J. INT'L & COMP. L. 767, 827 (1997). The scope of *jus cogens* norms varies widely among commentators. See also Vienna Convention, *supra* note 100, arts. 5, 30(1), 53, 64, 1155 U.N.T.S. at 339, 344, 347; ELIAS, *supra* note 149, at 177-87; 1 OPPENHEIM'S INT'L L., *supra* note 1, §§ 2, at 642, 653; SINCLAIR, *supra* note 100, at 17-18, 85-87, 94-95, 160, 184-85, 218-26, 246; RESTATEMENT (THIRD), *supra* note 62, §§ 102 r.n.6, 323 cmt. b, 331(2), 338(2); GRIGORII I. TUNKIN, *THEORY OF INTERNATIONAL LAW* 98 (William E. Butler trans., 1974); Levan Alexidze, *Legal Nature of Jus Cogens in Contemporary Law*, 172 R.C.A.D.I. 219, 262-63 (1981); Jimenez de Arechaga, *supra* note 117, at 64-69; John N. Hazard, *Soviet Tactics in International Lawmaking*, 7 DENV. J. INT'L L. & POL'Y 9, 25-29 (1977); Mark Weisburd, *The Emptiness of the Concept of Jus Cogens, As Illustrated by the War in Bosnia-Herzegovina*, 17 MICH. J. INT'L L. 1 (1995); *supra* note 137 and accompanying text.

at San Francisco not only by members of regional arrangements in the proper sense of that term, but also by parties to bilateral treaties governing their joint security, as well as assistance by one State to another without any treaty obligation. Article 51 was deliberately transferred . . . from Chapter VIII to Chapter VII with the result that the right of collective self-defense had become "entirely independent of the existence of a regional arrangement."²¹³

Collective self-defense does not depend on "the degree of organization or of treaty relationship" of states.²¹⁴ The term "collective" covers more than contractual systems of self-defense.²¹⁵ As one scholar notes, "[a]ny Member . . . is therefore authorized by the Charter to assist with its armed force an attacked State, whether or not there has been any previous arrangement to that effect."²¹⁶

Although it has been argued that an assisting state must have substantive rights or interests affected by an attacking state's action,²¹⁷ or that an assisting state must have an individual right of self-defense,²¹⁸ neither is a legal prerequisite for coming to the aid of a target state. Any assisting state may act out of general interest in preserving international peace and security, and can do so without a formal treaty as long as the target state consents.²¹⁹ A state assisting a target state need not be subjected to armed attack to invoke the right of self-defense for itself.²²⁰ However,

213. ALEXANDROV, *supra* note 1, at 101-02, quoting Waldock, *Regulation*, *supra* note 1, at 504 (referring to U.N. CHARTER arts. 39-51 (Chapter VII, Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression), 52-54 (Chapter VIII, Regional Arrangements)).

214. ALEXANDROV, *supra* note 1, at 102 (citing BOWETT, *supra* note 1, at 131).

215. *Id.* at 102 (citing GOODRICH ET AL., *supra* note 5, at 179; Waldock, *Regulation*, *supra* note 1, at 504).

216. ALEXANDROV, *supra* note 1, at 102 (citing GOODRICH ET AL., *supra* note 5, at 179; Kelsen, *LAW OF THE UNITED NATIONS*, *supra* note 4, at 796; Waldock, *Regulation*, *supra* note 1, at 504).

217. OPPENHEIM, *supra* note 1, § 52aa, at 155-56; Bowett, *Collective Self-Defence*, *supra* note 209, at 136-40, 159-60.

218. BOWETT, *supra* note 1, at 216-20; JULIUS STONE, *LEGAL CONTROLS OF INTERNATIONAL CONFLICT* 245 (1959 rev.); Bowett, *Collective Self-Defence*, *supra* note 209, at 139-40.

219. ALEXANDROV, *supra* note 1, at 102 (citing GOODRICH ET AL., *supra* note 5, at 348; Kelsen, *LAW OF THE UNITED NATIONS*, *supra* note 4, at 792; McDUGAL & FELICIANO, *supra* note 1, at 250). Starke states that the Security Treaty memorialized informal arrangements after World War II and during the Korean War. See J.G. STARKE, *THE ANZUS TREATY ALLIANCE* 98-99 (1965) (discussing Security Treaty, Sept. 1, 1951, preamble, 3 U.S.T. 3420, 3422, 131 U.N.T.S. 83, 84 [hereinafter ANZUS Pact]). See also TREVOR R. REESE, *AUSTRALIA, NEW ZEALAND AND THE UNITED STATES: A SURVEY OF INTERNATIONAL RELATIONS* chs. 2, 4 (1969); W. DAVID MCINTYRE, *BACKGROUND TO THE ANZUS PACT*, chs. 9-10 (1995); *infra* notes 239-43 and accompanying text. A theory of informal collective self-defense arrangements also supports, for example, actions of states assisting South Korea or maintaining naval forces between Taiwan and the China mainland during the Korean War. See generally George K. Walker, *State Practice Since World War II: 1945-1990*, in RICHARD J. GRUNAWALT, *THE LAW OF NAVAL WARFARE: TARGETING ENEMY MERCHANT SHIPPING* 121, 125-30 (Nav. War C. Int'l L. Stud., v. 65, 1993).

220. ALEXANDROV, *supra* note 1, at 103; GOODRICH ET AL., *supra* note 5, at 348.

collective self-defense has in any event always to be based ultimately upon the right of an individual State to take action in self-defense. . . . If . . . not linked by a previous arrangement with the attacked State such as, through a bilateral or multilateral treaty, [assisting states] have the right to use force to provide assistance on the basis of an explicit request by the [target] state.²²¹

The political truth in today's information age may point to use of treaties instead of informal collective self-defense arrangements. Nevertheless, such informal arrangements are lawful in the Charter era.

The foregoing analysis has not responded to the problem of states with divergent views on the scope of self-defense. While some states espouse an anticipatory self-defense policy, other states have a more restrictive or reactive ("take the first hit") policy.²²² Further, some states may share the same general policy (that of anticipatory self-defense) but differ as to under what situations and circumstances the norm may apply.²²³

Where an assisting state with an anticipatory self-defense policy comes to the aid of a state with a restrictive view, it will be presumed that the assisted state has either negotiated a treaty or made a request for assistance. Thus, the assisting state is free, but is not obliged, to employ anticipatory self-defense to fulfil its treaty or arrangement obligations. In the reverse situation, where a restrictive view state assists a state with a policy of anticipatory self-defense, the same principles should apply. The assisting state may, but is not obliged, to invoke anticipatory self-defense; the anticipatory self-defense state knew or should have known of the self-imposed limitations on the assisting state. In either case there is no need, as a matter of law, for the target state to request a kind or degree of assistance from the assisting state. However, as a matter of policy, the target state may request either reactive or anticipatory aid, and the assisting state

221. ALEXANDROV, *supra* note 1, at 103 (citing Waldock, *Regulation*, *supra* note 1, at 505). See also Louise Doswald-Beck, *The Legal Validity of Military Intervention by Invitation of the Government*, 56 BRIT. Y.B. INT'L L. 189, 218-21 (1985). The right to assist another state is not an inherent right. Kelsen, *LAW OF THE UNITED NATIONS*, *supra* note 4, at 797. This is consistent with one view of the law of treaties, which declares that treaty parties cannot agree to confer a benefit (here, aiding a target state) without beneficiary consent. RESTATEMENT (THIRD), *supra* note 62, § 324(3). Under this view, if an assisting state and a target state are U.N. Members, the target state faces a treaty-based benefit and must request help before the assisting state can act legally. Vienna Convention, *supra* note 100, art. 36(1), 1155 U.N.T.S. at 341, is the same as the *Restatement* view but adds that unless a treaty provides otherwise, assent is presumed. Under this approach an assisting state could assume that a benefit — help against an attacking state — is presumed under the article 51 collective self-defense. 1 OPPENHEIM'S INT'L L., *supra* note 1, § 627, at 1264, says the Charter is an exception to the rule that a treaty (the Charter) cannot impose benefits on a state not party, i.e., a state that is not a U.N. Member. However, this does not affect the article 51 request rule among U.N. Members. Requiring a request is the safer course; otherwise an assisting state may be accused of violating U.N. CHARTER art. 2. See 1 OPPENHEIM'S INT'L L., *supra*, § 626; SINCLAIR, *supra* note 100, at 98-106.

222. See generally *supra* note 1 for different views of the United States, which has an anticipatory self-defense policy and the USSR, which held a restrictive view.

223. See, e.g., *supra* note 3. Commentators disagree on the legality of the 1981 Israeli raid on the Iraq reactor. Compare, e.g., ALEXANDROV, *supra* note 1, at 159-65, with MCCORMACK, *supra* note 1, at 285-302.

should carefully consider which kind of assistance is being sought. Thus a target state might ask for self-defense help that amounts to reactive and not anticipatory action. In that case the assisting state must consider whether it can, as a matter of policy, stop at that line, commensurate with its municipal governance limitations, e.g. action taken by its legislative body, or its perceived need to assure safety of its contributed forces. In the reverse situation, where an anticipatory self-defense state asks what amounts to anticipatory self-defense help from a state espousing a restrictive view, the same principles should apply.

There is a critical difference between a treaty relationship and a more informal request or arrangement when a situation develops. Failure to comply with a treaty term as understood by prior interpretive practice carries with it the risk of denunciation,²²⁴ claims of breach,²²⁵ fundamental change of circumstances,²²⁶ impossibility of performance,²²⁷ among other risks.

The foregoing situations assume a bilateral relationship, by treaty or otherwise. The problem is more complicated in circumstances of multilateral relationships. However, if states with the same anticipatory self-defense view aid a group of reactive view states, or if a group of reactive

224. Unless a treaty provides otherwise, it remains in effect a year after a notice of denunciation is filed. See generally Vienna Convention, *supra* note 100, arts. 56-58, 1155 U.N.T.S. at 345; International Law Commission, Report on the Work of its 18th Sess., *Report of the Commission to the General Assembly*, U.N. Doc. A/6309/Rev. 1, reprinted in 2 1974 Y.B. INT'L L. COMM. 171, 250-51 [hereinafter ILC Rep.]; BROWNIE, *supra* note 149, at 617; McNAIR, *supra* note 149, at 493-94; 1 OPPENHEIM'S INT'L L., *supra* note 1, § 647; RESTATEMENT (THIRD), *supra* note 62, §§ 332-33; SINCLAIR, *supra* note 100, at 183-88.

225. Claim of a material breach, without notice and other procedures, does not entitle a claimant to say a treaty is terminated. See ILC Rep., *supra* note 224, at 253-55. Claims of breach must go to the heart of an agreement. Special rules apply to multilateral treaties. Vienna Convention, *supra* note 100, art. 60, 1155 U.N.T.S. at 346; Advisory Opinion on Namibia, 1971 I.C.J. 16, 46-47; Jurisdiction of ICAO Council (India v. Pak.), 1972 I.C.J. 46, 67; RESTATEMENT (THIRD), *supra* note 62, § 335; BROWNIE, *supra* note 149, at 618-19; 1 OPPENHEIM'S INT'L L., *supra* note 1, § 649; SINCLAIR, *supra* note 100, at 20, 166, 188-90.

226. For example, a state with a strong anticipatory self-defense policy assisting a reactive self-defense policy state insisting on reactive self-defense aid might claim that only reactive aid would endanger its forces, configured for anticipatory self-defense, and that this amounts to a fundamental change of circumstances because its self-defense preparations are keyed to use in an anticipatory mode. For further analysis of fundamental change of circumstances, see Vienna Convention, *supra* note 100, art. 62, 1155 U.N.T.S. at 346; Fisheries Jurisdiction (Ice. v. U.K.), 1973 I.C.J. 3, 18; BROWNIE, *supra* note 149, at 620-21; ARIE E. DAVID, *THE STRATEGY OF TREATY TERMINATION* ch. 1 (1975); ELIAS, *supra* note 149, at 119-28; ILC Rep., *supra* note 224, at 257-58; 1 OPPENHEIM'S INT'L L., *supra* note 1, § 651; RESTATEMENT (THIRD), *supra* note 62, § 336; SINCLAIR, *supra* note 100, at 20, 192-96; Gyorgy Haraszti, *Treaties and the Fundamental Change of Circumstances*, 146 R.C.A.D.I. 1 (1975); Oliver J. Lissitzyn, *Treaties and Changed Circumstances*, 61 AM. J. INT'L L. 895 (1967).

227. For further analysis of impossibility of performance, see Vienna Convention, *supra* note 100, art. 61, 1155 U.N.T.S. at 346; ELIAS, *supra* note 149, at 128-30; ILC Rep., *supra* note 224, at 255-56; 1 OPPENHEIM'S INT'L L., *supra* note 1, § 650; SINCLAIR, *supra* note 100, at 190-92.

view states aid a group of anticipatory self-defense states, the result is the same as in the bilateral context.

The complications increase, however, when some assisting states have anticipatory self-defense positions while others have a reactive self-defense policy, and target states have similarly differing views. Second, suppose that some assisting states have differing anticipatory self-defense views,²²⁸ and others have differing reactive self-defense policies, and the same is true for target states. The same, and perhaps greater, risks of denunciations, claims of treaty breach, fundamental change of circumstances, or impossibility might be lodged.²²⁹ One solution for this problem might be the Vienna Convention on the Law of Treaties approach on reservations,²³⁰ which provides that anticipatory self-defense applies only as to those states that mutually agree on principles and that otherwise the lowest common denominator (perhaps a diminished scope for anticipatory self-defense or only reactive self-defense) applies as between parties.²³¹ In a multinational military operation, analysis, like that imposed by the Vienna Convention for multilateral treaties, could create a legal nightmare.²³² An alternative might be an analogy to the traditional rule for treaty reservations, that all states must concur²³³ or assistance will end. Another alternative is consultation in a given situation, provided for by a treaty term much like those terms in the pre-World War I treaties, as opposed to reliance on arrangements or target state requests. This appears to be the direction toward which mutual defense treaties are headed.²³⁴

There are two more issues involved with claims of self-defense. First, states may change policies after ratifying a treaty, perhaps moving from reactive self-defense to an anticipatory self-defense posture. A state may

228. See, for example, *supra* notes 3, 221 and accompanying text for differing views of commentators on the validity of claims of anticipatory self-defense claims for specific operations.

229. See *supra* notes 225-27 and accompanying text.

230. See Vienna Convention, *supra* note 100, arts. 19-23, 1155 U.N.T.S. at 337-38.

231. This is like the rule of regression to common denominator when states rely on custom and there are objectors. See RESTATEMENT (THIRD), *supra* note 62, § 102 cmts. b, d; BROWNIE, *supra* note 149, at 10; 1 OPPENHEIM'S INT'L L., *supra* note 1, § 10, at 29; Michael Akehurst, *Custom As a Source of Law*, 47 BRIT. Y.B. INT'L L. 1, 23-27 (1974); C.H.M. Waldock, *General Course on Public International Law*, 106 R.C.A.D.I. 1, 49-53 (1962). But see Jonathan Charney, *Universal International Law*, 87 AM. J. INT'L L. 529, 538-41 (1993) (existence of persistent objector rule open to serious doubt). J. ASHLEY ROACH & ROBERT W. SMITH, UNITED STATES RESPONSES TO EXCESSIVE MARITIME CLAIMS (2d ed. 1996), an exhaustive study of objections to law of the sea claims, indicates that the persistent objector rule is alive and well, at least for law of the sea issues. Undoubtedly there are thousands of protests filed annually on many issues in the chancelleries, few if any of which are published. It cannot therefore be assumed, as some commentators do, that the rule of the persistent objector is in desuetude.

232. Cf. RESTATEMENT (THIRD), *supra* note 62, § 313 cmt. b; BROWNIE, *supra* note 149, at 611.

233. See, e.g., Genocide Reservations Case, *supra* note 149, 1951 I.C.J. at 32 (Guerero, Vice Pres.; Hsu Mo, McNair, Read, JJ., dissenting); RESTATEMENT (THIRD), *supra* note 62, § 313 r.n.1; BROWNIE, *supra* note 149, at 609; MCNAIR, *supra* note 149, at 169; 1 OPPENHEIM'S INT'L L., *supra* note 1, § 616, at 1245; SINCLAIR, *supra* note 100, at 54-55.

234. See *infra* notes 253-315 and accompanying text.

declare a shift within policy; for example, what was not considered a proper circumstance for claiming anticipatory self-defense yesterday is now considered within the scope of a proper claim today. Such a shift in policy might, at the least, cause discomfort among treaty partners, and at worst, trigger denunciations, claims of treaty breach, fundamental change of circumstances, or impossibility of performance.²³⁵

The second issue involves the attacking state's posture. If an attacking state, a target state, and an assisting state share common self-defense positions, then this would tend to legitimize assisting state operations as a manifestation of local, or special, custom.²³⁶ If the assisting and target states take one view of the issue, and the attacking state takes another, this might be grounds for a claim that an opponent has not engaged in legitimate action. Thus, if an assisting state wishes to assert that it is acting within the law, it could more safely do so if it acts according to its allies' or opponents' views. Where a state has an anticipatory self-defense view, this might mean employing military force in only a reactive self-defense mode, or at least claiming to do so, if the opponent or target state has adopted the restrictive view. This is a policy decision and not a question of law; it is akin to using more restrictive rules of engagement (ROE) than those permitted by law. ROE for combat forces may provide for wartime and peacetime scenarios in which rights to individual or collective self-defense, including anticipatory self-defense, may be more circumscribed than the law would allow.²³⁷

Many of these issues do not find responses in reported practice or decisional law.

B. The War Crimes Trials and Self-Defense

The Nuremberg International Military Tribunal relied on the Pact of Paris in its findings of guilt.²³⁸ The Tribunal rejected defense claims that Ger-

235. See *supra* notes 225-27 and accompanying text. Although Iceland's claims of fundamental change in law were rejected, Fisheries Jurisdiction, *supra* note 226, 1973 I.C.J. at 16-21, did not discount the possibility that a large enough change in law could be grounds for a change of circumstances claim.

236. Asylum (Colom. v. Peru), 1950 I.C.J. 266, 277; Right of Passage Over Indian Terr. (Port. v. India), 1960 I.C.J. 6; RESTATEMENT (THIRD), *supra* note 62, § 102 cmt. e; BROWN-LIE, *supra* note 149, at 9-10; 1 OPPENHEIM'S INT'L L., *supra* note 1, § 10, at 30.

237. ROE state options for, and possibly limits on, actions a commander may take in armed conflict situations. In U.S. practice, commanders are strongly reminded of their duty to defend their ship, unit, etc., i.e., to exercise self-defense, including anticipatory self-defense, pursuant to U.S. policy. See generally BRADD C. HAYES, NAVAL RULES OF ENGAGEMENT: MANAGEMENT TOOLS FOR CRISIS (1989); J. Ashley Roach, *Rules of Engagement*, 36 NAV. WAR C. REV. 46 (No. 1, 1983), reprinted in 14 SYRACUSE J. INT'L L. & COM. 865 (1988); Ivan A. Shearer, *Rules of Engagement and the Implementation of the Law of Naval Warfare*, reprinted in 14 SYRACUSE J. INT'L L. & COM. 767 (1988); *supra* note 1 and accompanying text.

238. See *supra* notes 10, 136-52 and accompanying text. McCORMACK, *supra* note 1, at 253-61, has extensive, helpful analysis of the trials. See also ALEXANDROV, *supra* note 1, at 73-76.

many had acted in self-defense.²³⁹ Admiral Erich Raeder's theory was that Germany occupied Norway as a necessary act of self-defense to forestall Allied landings there. Citing the *Caroline Case*,²⁴⁰ the Tribunal recognized a right of anticipatory self-defense: "[P]reventative action in foreign territory is justified only in the case of an instant and overwhelming necessity for self-defense, leaving no choice of means and no moment for deliberation."²⁴¹ The Tribunal found that this was not true for German invasions of Denmark and Norway.²⁴² The defense was unable to demonstrate "an intention formed in good faith and honesty of conviction to protect one's own safety, that safety being immediately threatened."²⁴³

In the Tokyo trials involving accused Japanese war criminals, a defense was that because the Netherlands had declared war on Japan before Japan had made a formal war declaration,²⁴⁴ attacks against Dutch Asian territories constituted self-defense. The Tribunal held the Netherlands had acted in anticipatory self-defense:

The fact that the Netherlands, . . . fully apprised of the imminence of the attack [by Japan], in self-defense declared war against Japan on 8th December and thus officially recognised the existence of a state of war which had been begun by Japan, cannot change that war from a war of aggression [by] . . . Japan into something other than that.²⁴⁵

There was strong evidence of Japan's preparations to invade the Dutch East Indies, and the Netherlands chose to declare war before Japan's formal declaration. The Netherlands did not then have self-defense treaties with the Allies, insofar as the published record shows. However, the fact that the Netherlands acted in concert with the Allies immediately afterward is some evidence of informal collective self-defense, a concept recognized before and after ratification of the Charter.²⁴⁶

These decisions, coming just after the General Assembly had con-

239. *United States v. Goering*, 17 Tr. Maj. War Crim. Before Int'l M. Trib. 458, 469 (1948), 41 AM. J. INT'L L. 172 (argument of Prof. Dr. Hermann Jahreiss, counsel for defendant Albert Jodl).

240. See *supra* note 26 and accompanying text.

241. *Nuremberg Judgment*, 1 Tr. Maj. War Crim. Before Int'l M. Trib. at 208, 218-22, 41 AM. J. INT'L L. at 205, 207.

242. The Tribunal also dismissed arguments, based on Secretary of State Kellogg's comments on the self-defense reservation to the Pact of Paris, *supra* note 11, that Germany alone could judge the legitimacy of its own self-defense claim. *Nuremberg Judgment*, 1 Tr. Maj. War Crim. Before Int'l M. Trib. at 218-22, 41 AM. J. INT'L L. at 207. See also MCCORMACK, *supra* note 1, at 254-56; *supra* notes 136-52 and accompanying text.

243. BOWETT, *supra* note 1, at 143. See also MCCORMACK, *supra* note 1, at 254-56.

244. Cf. *Hague III*, *supra* note 47, arts. 1, 3, 36 Stat. at 2271. Japan ratified *Hague III* in 1911, the Netherlands in 1909. DIETRICH SCHINDLER & JIRI TOMAN, *THE LAWS OF ARMED CONFLICTS: A COLLECTION OF CONVENTIONS, RESOLUTIONS AND OTHER DOCUMENTS* 60 (3d ed. 1988).

245. *United States v. Araki*, Judgment of the International Military Tribunal for the Far East (Nov. 4-12, 1948), reprinted in 1 *THE TOKYO JUDGMENT: THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST (I.M.T.F.E.) 29 APRIL 1946-12 NOVEMBER 1948*, at 382 (B.V.A. Röling & C.F. Rüter eds., 1977).

246. *Id.* at 15, 21. See also ALEXANDROV, *supra* note 1, at 76; MCCORMACK, *supra* note 1, at 258-59.

firmed the Nuremberg Charter as customary law,²⁴⁷ strongly evidence²⁴⁸ a right of anticipatory self-defense and perhaps, for the Netherlands, the practice of informal collective self-defense arrangements.

C. Anticipatory Collective Self-Defense at the Creation of the U.N. System

The record during and just after World War II does not show that the law of collective self-defense, including anticipatory collective self-defense, was different than before the war. The Charter drafters included a right of collective self-defense, largely at the behest of parties to the Act of Chapultepec, but they did so in the context of the Pact of Paris, the Locarno Treaties, and other agreements, such as Nyon²⁴⁹ and bilateral treaties in 1935 and thereafter.²⁵⁰ Invoking collective self-defense under the Charter could come through formal treaty, informal arrangement, or by the target state's request.²⁵¹ Problems of varying views on the scope of self-defense within these modalities were not resolved when this norm was written into the Charter.²⁵² The Nuremberg and Tokyo judgments were not handed down until after the Charter was in force, but they confirm a right of anticipatory self-defense.

IV. Collective Self-Defense Treaties During the Charter Era

Bilateral and multilateral defense agreements have been concerned with collective self-defense since 1945.²⁵³ Article 51 states a right and not a duty of self-defense; however, the right is transformed into a duty in self-defense treaties.²⁵⁴ Section A of this Part discusses these arrangements. Section B argues that national decision-makers should be bound by what they knew, or should have known, at the time the decision to respond in anticipatory self-defense is made, the standard for the law of armed conflict, that is the *jus in bello*.

247. G.A. Res. 95(1), *supra* note 142.

248. I.C.J. STATUTE, art. 38(1)(d); RESTATEMENT (THIRD), *supra* note 62, § 103(2). Most municipal legal systems recognize a right of anticipatory self-defense. MCCORMACK, *supra* note 1, at 271. This adds more weight to a view that the right exists in international law. I.C.J. STATUTE, art. 38(1)(c). *But see* RESTATEMENT (THIRD), *supra*, § 103(2).

249. *See supra* notes 74, 163-68 and accompanying text.

250. *See supra* notes 178-98 and accompanying text.

251. *See supra* notes 18, 39-44, 163-68, 178-98, 219, 245 and accompanying text.

252. *See supra* notes 207-21 and accompanying text.

253. Part IV does not examine practice under the agreements. Others have examined such practice. *See generally*, e.g., ALEXANDROV, *supra* note 1, at 215-90; GOODRICH ET AL., *supra* note 5, at 345-48; MCCORMACK, *supra* note 1, at 211-39. These discuss better-known situations. JAMES CABLE, GUNBOAT DIPLOMACY 1919-1991 at 178-213 (4th ed. 1994) demonstrates that smaller incidents since 1945 that may involve bilateral or occasionally multilateral responses may supply more content to practice than is now available. Part IV does not consider the right, recognized under the Charter and in pre-Charter times, for states to use arrangements less formal than a treaty to assert collective self-defense, including anticipatory self-defense. *See supra* notes 18, 39-44, 219, 245 and accompanying text.

254. ALEXANDROV, *supra* note 1, at 102; Tucker, *supra* note 1, at 33.

A. Treaties Providing for Collective Self-Defense

The Act of Chapultepec, instrumental in shaping article 51 of the Charter,²⁵⁵ was replaced by the Rio Treaty (1947), whose article 3(1) provides that an armed attack on an American state is considered an attack on all American states and that each party would undertake to assist in meeting the attack "in the exercise of the inherent right of individual or collective self-defense recognized by article 51."²⁵⁶ Article 3(1) is nearly identical with Part I(3) of the Act.²⁵⁷ Undoubtedly, the Treaty drafters wished to carry forward the meaning of the inherent right of self-defense incorporated in the Act in 1945 through article 51.²⁵⁸

The Treaty also declares that "[o]n the request of the State or States directly attacked" and until there is a decision by the Inter-American System's Organ of Consultation, each party may determine "immediate measures" that it will take to fulfil the collective self-defense obligation.²⁵⁹ These self-defense measures can proceed until the U.N. Security Council takes measures necessary to maintain international peace and security.²⁶⁰ If any American state's inviolability, territorial integrity, sovereignty or political independence is affected by aggression (that falls short of an armed attack), by a conflict, "or by any other fact or situation that might endanger the peace of America," the Treaty's Organ of Consultation must meet immediately.²⁶¹ The Members must then agree on measures to be

255. See *supra* notes 205-20 and accompanying text.

256. Rio Treaty, *supra* note 205, art. 3(1), 62 Stat. at 1700, 21 U.N.T.S. at 95.

257. Compare Rio Treaty, *supra* note 205, art. 3(1), 62 Stat. at 1700, 21 U.N.T.S. at 95, with Act of Chapultepec, *supra* note 205, Parts I(3), III, 60 Stat. at 1839-40. The Treaty applies within North and South America and adjoining oceans. Rio Treaty, *supra*, arts. 3(3), 4, 62 Stat. at 1700-01, 21 U.N.T.S. at 97. Act of Chapultepec, *supra*, Parts I(3), III, 60 Stat. at 1839-40, had provisions similar to article 3(1) of the Treaty, but the Act declared that provisions were subject to the projected international organization, i.e., the United Nations, and had no specific geographic parameters of application, although the whole tenor of the Act pointed toward Western Hemisphere self-defense. Cf. Canyes, *supra* note 205, at 506. See also Charter of the Organization of American States, Apr. 30, 1948 (OAS Charter), 2 U.S.T. 2394, 119 U.N.T.S. 3, amended by Protocol, Feb. 27, 1967, 21 U.S.T. 607; Protocol, Dec. 5, 1985, 21 I.L.M. 533 (1985). The OAS Charter replaced the Pan American Union when the Act of Chapultepec was signed. The 1985 OAS protocol is not in force for all members, including the United States. M.J. BOWMAN & D.J. HARRIS, MULTILATERAL TREATIES: INDEX AND CURRENT STATUS 177 (11th Cum. Supp. 1995). For history of inter-American relations in the Pan American Union, OAS and Rio Treaty contexts, see generally M. MARGARET BALL, THE OAS IN TRANSITION (1969); GORDON CONNELL-SMITH, THE INTER-AMERICAN SYSTEM (1966); STOETZER, *supra* note 18; ANN VAN WYNEN THOMAS & A.J. THOMAS, JR., THE ORGANIZATION OF AMERICAN STATES (1963); Charles G. Fenwick, *The Inter-American Regional System: Fifty Years of Progress*, 50 AM. J. INT'L L. 18 (1956).

258. See *supra* notes 204-07 and accompanying text.

259. Rio Treaty, *supra* note 205, art. 3(2), 62 Stat. at 1700, 21 U.N.T.S. at 96-97; Act of Chapultepec, *supra* note 205, had no counterpart.

260. Rio Treaty, *supra* note 205, art. 3(4), 62 Stat. at 1700, 21 U.N.T.S. at 97. See also *id.* art. 5, 62 Stat. at 1701, 21 U.N.T.S. at 97; U.N. CHARTER art. 51. Rio Treaty, art. 1, 62 Stat. at 1700, 21 U.N.T.S. at 95, pledges that parties will not threaten or use force inconsistent with the Charter. Cf. U.N. CHARTER arts. 2(4), 103; *supra* notes 137, 212 and accompanying text.

261. Rio Treaty, *supra* note 205, art. 6, 62 Stat. at 1701, 21 U.N.T.S. at 97-99.

taken, in case of aggression, to assist a victim of such aggression, or measures that should be taken for common defense and for maintaining peace and security.²⁶²

The 1948 treaty that formed the Western European Union provides similarly that if a party is "the object of an armed attack in Europe, the other . . . Parties will, in accordance with . . . Article 51 . . . , afford the Party so attacked all the military and other aid and assistance in their power."²⁶³ The Treaty provides for a Consultative Council "[f]or . . . consulting together on all the questions dealt with in the . . . Treaty, . . . which shall be organized as to be able to exercise its functions continuously."²⁶⁴ The 1948 agreement also provides for reporting to the Security Council and ending WEU action when the Council takes measures necessary to maintain or restore international peace and security. Nothing in the Treaty "prejudice[s] in any way the obligations of the . . . Parties under the . . . Charter" ²⁶⁵ Nothing in the Treaty indicates that its drafters failed to consider that they were carrying forward the understanding of the Charter drafters, that is, that WEU states can invoke the inherent right of self-defense. Indeed, the Treaty's explicit reference to article 51 tends to confirm this point. The 1954 WEU Protocols provide for forces to be contributed for self-defense.²⁶⁶ Protocol I declares that parties "shall work in close co-operation" with NATO, and that the Council and its agency will rely on NATO military authorities for information and advice.²⁶⁷ The

262. *Id.* Article 9 defined aggression as including:

- a. Unprovoked armed attack by a State against the territory, the people, or the land, sea or air forces of another State; [and]
- b. Invasion, by the armed forces of a State, of the territory of an American State, through the trespassing of boundaries demarcated in accordance with a treaty, judicial decision, or arbitral award, or, [absent] . . . frontiers thus demarcated, invasion affecting a region . . . under the effective jurisdiction of another State.

Id. art. 9. Cf. Act of Chapultepec, *supra* note 205, Parts I(3)-I(4), 60 Stat. at 1839.

263. Treaty of Economic, Social and Cultural Collaboration and Collective Self-Defence, Mar. 17, 1948, art. 4, 19 U.N.T.S. 51, 57 [hereinafter WEU Treaty], amended by Protocol Modifying Treaty for Collaboration in Economic, Social and Cultural Matters and for Collective Self-Defence, Oct. 23, 1954, 211 U.N.T.S. 342 [hereinafter WEU Protocol I]; Protocol on Forces of Western European Union, Oct. 23, 1954, 211 U.N.T.S. 358 [hereinafter WEU Protocol II]; Protocol on Control of Armaments, with Annexes, Oct. 23, 1954, 211 U.N.T.S. 364; Protocol on the Agency of Western European Union for Control of Armaments, Oct. 23, 1954, 211 U.N.T.S. 376; and other protocols in 1990 and 1992, which do not amend art. 4. See BOWMAN & HARRIS, *supra* note 257, at 177 (11th Cum. Supp. 1995).

264. WEU Treaty, *supra* note 263, art. 7, 19 U.N.T.S. at 59. In 1955 the Council was renamed the Council of Western European Union, but otherwise its functions remain the same. Compare *id.* with WEU Protocol I, *supra* note 263, art. 8, 211 U.N.T.S. at 346.

265. Nothing in the Treaty can be interpreted as affecting the Council's authority and responsibility under the Charter to take action it deems necessary to maintain or restore international peace and security. WEU Treaty, *supra* note 263, art. 5, 19 U.N.T.S. at 59.

266. WEU Protocol II, *supra* note 263, 211 U.N.T.S. 364.

267. WEU Protocol I, *supra* note 263, art. 3, 211 U.N.T.S. at 346. The WEU was moribund for more than 30 years, existing in the shadow of NATO, but it was revitalized in 1986 to meet issues arising out of the Iran-Iraq war in the Persian Gulf. *Europe's Multilateral Organizations*, 3 DEP'T ST. DISPATCH 351, 354 (1992). The European Union

WEU, inactive for more than three decades, was revived in 1984 in connection with European Union integration;²⁶⁸ the 1980-88 Tanker War also spurred action.²⁶⁹

In 1949 the North Atlantic Treaty was signed. Article 5 provides in part that:

[A]rmed attack against one or more of [the parties] in Europe or North America shall be considered an attack against them all; and consequently [the parties] agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defense recognized by article 51 . . . will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area.²⁷⁰

Specific reference to article 51 carries forward an understanding that parties possess inherent rights to individual and collective self-defense. Article 7 adds that the Treaty "does not affect, and shall not be interpreted as affecting, in any way the rights and obligations under the Charter of the Parties which are [U.N.] members . . . , or the primary responsibility of the Security Council for the maintenance of international peace and secur-

has recognized WEU's security role. See generally Walker, *Integration and Disintegration*, *supra* note 51, at 15-17.

268. See generally ALFRED CAHEN, *THE WESTERN EUROPEAN UNION AND NATO* 1016 (1989); *THE CHANGING FUNCTIONS OF THE WESTERN EUROPEAN UNION (WEU)* xiii-xxx (Arie Bloed & Ramses A. Wessel eds. 1994) [hereinafter *CHANGING FUNCTIONS*]; STANLEY R. SLOAN, *NATO'S FUTURE: TOWARD A NEW TRANSATLANTIC BARGAIN* 173-75 (1985). Treaty of Dunkirk, *supra* note 74, had been a WEU predecessor; other European states' desire to accede was a catalyst for drafting the WEU Treaty. COOK, *supra* note 74, at 116, 122, 259-60. Ironically, a European Defense Community had been contemplated as part of the then European Economic Community; it would have been "exclusively defensive" but would have allowed response to any "armed aggression" against a member state or European Defense Forces constituted under the Treaty. The Treaty pledged cooperation with the North Atlantic Treaty Organization. Treaty Constituting the European Defence Community, May 27, 1952, arts. 2, 5, *reprinted in* NAVAL WAR COLLEGE, *INTERNATIONAL LAW DOCUMENTS* 1952-53, at 147, 148-49 (1954); Karl Lowenstein, *Sovereignty and International Co-Operation*, 48 AM. J. INT'L L. 222, 237-38 (1954). The Europeans failed to ratify the treaty, so it never entered into force. U.S. Secretary of State John Foster Dulles, Statement to U.S. Senate Armed Services Committee, 32 DEP'T ST. BULL. 605, 606 (1955). The United States had not opposed the Treaty. Message of the President of the United States Stating United States Position on Relation between the European Defense Community and the North Atlantic Treaty Organization, Apr. 16, 1954, N.Y. TIMES, Apr. 17, 1954, *reprinted in* NAVAL WAR COLLEGE, *supra*, at 232.

269. WEU Statement on Recent Events in the Gulf, Apr. 19, 1988, in *CHANGING FUNCTIONS*, *supra* note 268, at 81; CAHEN, *supra* note 268, at 47-50.

270. North Atlantic Treaty, *supra* note 95, art. 5, 63 Stat. at 2244, 34 U.N.T.S. at 246, modified as to territory covered by Protocol on Accession of Greece and Turkey, *supra* note 95, 3 U.S.T. 43, 126 U.N.T.S. 350. Article 6 defined the territory of the parties covered by article 5. *Id.* art. 6. See also Protocol on Accession of Federal Republic of Germany, *supra* note 95, 6 U.S.T. 5707, 243 U.N.T.S. 308; Protocol on Accession of Spain, *supra* note 95, 34 U.S.T. 3510. These protocols do not affect the substance of other terms of the North Atlantic Treaty. Currently NATO is in the process of admitting new members in Eastern Europe. See *supra* note 95 and accompanying text.

ity.”²⁷¹ States also agree to “consult together whenever, in the opinion of any of them, the territorial integrity, political independence or security of any . . . Part[y] is threatened.”²⁷²

In 1950 the Arab League signed a Joint Defense Treaty, whose article 2 provides that:

Contracting States agree that an armed aggression, directed against any one or more of them or against their forces, shall be considered as directed against all. . . . [T]hey agree, in virtue of the right of legitimate self-defence, both individual and collective, to assist at once the State or States so attacked and to adopt immediately, both individually and collectively, all . . . measures and means at their disposal, including . . . employment of armed force, to repulse the aggression and restore peace and security.²⁷³

The Security Council must be informed immediately of an aggression and the steps and measures to be taken.²⁷⁴ Although it does not refer to article 51 specifically, the Treaty could not contravene individual and collective self-defense rights proclaimed in the Charter.²⁷⁵ Article 3 also pledges:

States shall consult together at the request of any one of them, whenever the integrity of the territory, independence or security of any one of them is exposed to danger.

In the event of the imminent risk of war or the advent of a sudden international development believed to be dangerous, . . . States shall at once hasten to coordinate their measures as the situation may require.²⁷⁶

The latter clause directly supports a view that the inherent right of collective self-defense includes a right of anticipatory self-defense. That the League contemplated more than reactive collective self-defense is also supported by the Treaty’s Military Annex, article 1(a). The Permanent Military Committee created by the Treaty is charged with “[p]repar[ing] . . . military plans to meet all foreseeable dangers or any armed aggression which might

271. North Atlantic Treaty, *supra* note 95, art. 7, 63 Stat. at 2244, 34 U.N.T.S. at 248. See also U.N. CHARTER arts. 2(4), 103; *supra* notes 137, 212 and accompanying text.

272. North Atlantic Treaty, *supra* note 95, art. 4, 63 Stat. at 2242, 34 U.N.T.S. at 246. See also HARLAN CLEVELAND, NATO: THE TRANSATLANTIC BARGAIN 13-33 (1970) (discussing “golden rule of consultation”). For NATO origins and development, see COOK, *supra* note 74; ALFRED GROSSER, THE WESTERN ALLIANCE: EUROPEAN-AMERICAN RELATIONS SINCE 1945 (Michael Shaw trans. 1980); ROBERT ENDICOTT OSGOOD, NATO: THE ENTANGLING ALLIANCE (1962); SLOAN, *supra* note 268; John Duffield, *The North Atlantic Treaty Organization: Alliance Theory*, in NGAIRE WOODS, EXPLAINING INTERNATIONAL RELATIONS SINCE 1945 ch. 15 (1996); Goodhart, *supra* note 209.

273. Treaty of Joint Defence and Economic Co-operation Between Arab States, with Military Annex, June 17, 1950, art. 2, 157 Brit. & For. St. Pap. 669-70, 49 AM. J. INT’L L. 51 (Supp. 1955) [hereinafter Arab League Joint Defense Treaty].

274. *Id.* See also Pact of League of Arab States, Mar. 22, 1945, 70 U.N.T.S. 238; HUSSEIN A. HASSOUNA, THE LEAGUE OF ARAB STATES AND REGIONAL DISPUTES ch. 1 (1975); MAJID KHADDURI, THE GULF WAR: THE ORIGINS AND IMPLICATIONS OF THE IRAQ-IRAN CONFLICT 140 (1988); ROBERT W. MACDONALD, THE LEAGUE OF ARAB STATES (1965); Majid Khadduri, *The Arab League As a Regional Arrangement*, 40 AM. J. INT’L L. 756 (1946).

275. U.N. CHARTER art. 103. See also *supra* notes 137, 212 and accompanying text.

276. Arab League Joint Defense Treaty, *supra* note 273, art. 3, 157 Brit. & For. St. Pap. at 670, 49 AM. J. INT’L L. Supp. at 52.

be attempted against one or more . . . Contracting States or their forces."²⁷⁷

In 1951 Australia, New Zealand, and the United States concluded the ANZUS Pact.²⁷⁸ Similar to other mutual security agreements, and modeled on the North Atlantic Treaty,²⁷⁹ the Pact provides for consultation.²⁸⁰ There is "recogni[tion] that an armed attack in the Pacific Area on any . . . Part[y] would be dangerous to [other parties'] peace and safety."²⁸¹ Parties will "meet the common danger in accordance with [their] constitutional processes."²⁸² Like earlier agreements, there is a pledge of reporting to the Security Council and ending self-defense measures once the Council takes necessary measures.²⁸³ Unlike the North Atlantic Treaty, however, there is no statement that an attack on one is an attack on all.²⁸⁴ Nevertheless, the construction of the "armed attack" provision in article 4 should receive the same construction as the phrase in article 51 of the Charter.²⁸⁵

The 1954 Southeast Asia Treaty Organization (SEATO) includes similar language on aggression by armed attack: consultation after a threat to a party's territory, sovereignty or political independence; and reporting to the Security Council. The Treaty requires a government's invitation or consent before the assisting state takes action on that member's territory.²⁸⁶

277. *Id.*, Military Annex, art. 1(a), 157 Brit. & For. St. Pap. at 672, 49 AM. J. INT'L L. Supp. at 53.

278. ANZUS Pact, *supra* note 219, 3 U.S.T. at 3423, 131 U.N.T.S. at 86 (suspended for New Zealand, Sept. 1, 1986). MCINTYRE, *supra* note 219, at 403-05; TIF, *supra* note 138, at 350. For analysis of New Zealand's refusal to admit ships with nuclear capability and ANZUS future prospects, see generally JACOB BERCOVITCH, ANZUS IN CRISIS (1988); FRANK P. DONNI, ANZUS IN REVISION (1991); MICHAEL C. PUGH, THE ANZUS CRISIS, NUCLEAR VISITING AND DETERRENCE (1989); THOMAS-DURRELL YOUNG, AUSTRALIAN, NEW ZEALAND, AND UNITED STATES SECURITY RELATIONS, 1951-1986 (1992); W. Keith Jackson & James W. Lamare, *The ANZUS Conflict and New Zealand Politics*, in INTERNATIONAL CRISIS AND DOMESTIC POLITICS 53 (Lamare ed. 1991); Jock Phillips, *New Zealand and the ANZUS Alliance: Changing National Self-Perceptions*, in AUSTRALIA, NEW ZEALAND, AND THE UNITED STATES: INTERNAL CHANGE AND ALLIANCE RELATIONS IN THE ANZUS STATES 183 (Richard W. Baker ed. 1991); James N. Rosenau, *Peripheral International Relationships in a More Benign World: Reflections on American Orientations Toward ANZUS*, in *id.* at 203.

279. STARKE, *supra* note 219, at 77.

280. ANZUS Pact, *supra* note 219, art. 3, 3 U.S.T. at 3423, 131 U.N.T.S. at 86.

281. *Id.* art. 4.

282. *Id.*

283. *Id.* Like the Rio Treaty and the NATO Agreement, the ANZUS Pact, *id.* art. 5, 3 U.S.T. at 3423, 131 U.N.T.S. at 86, limits its territorial scope to attacks on parties' metropolitan territories, island territories under their jurisdiction, or their armed forces, public vessels or aircraft in the Pacific.

284. Compare ANZUS Pact, *supra* note 219, art. 4, 3 U.S.T. at 3423, 131 U.N.T.S. at 86, with North Atlantic Treaty, *supra* note 95, art. 5, 63 Stat. at 2244, 34 U.N.T.S. at 246. Similar to the Rio and North Atlantic Treaties, *supra* notes 95, 205, ANZUS Pact, *supra*, art. 5, 3 U.S.T. at 3423, 131 U.N.T.S. at 86, limits its territorial scope to attacks on parties' metropolitan territories, island territories under their jurisdiction, and parties' armed forces, public vessels or aircraft in the Pacific. See also MCINTYRE, *supra* note 219, chs. 11-15; REESE, *supra* note 219, ch. 8; STARKE, *supra* note 219, chs. 1-2; Leicester C. Webb, *Australia and SEATO*, in GEORGE MODELSKI, SEATO: SIX STUDIES 47, 50-57 (1964). As of 1965 there had been no NATO-ANZUS liaison. STARKE, *supra* note 219, at 226-28.

285. STARKE, *supra* note 219, at 121.

286. It did not include application to parties' armed forces or public vessels or aircraft. Southeast Asia Collective Defense Treaty, with Protocol, Sept. 8, 1954, arts. 4, 8, 6

The Pacific Charter (1954) declares the determination of its parties to prevent or counter by appropriate means any attempt in the treaty area to subvert their freedom or to destroy their sovereignty or territorial integrity.²⁸⁷ Although SEATO Treaty obligations remain in effect, its supporting organization ceased to exist in 1975.²⁸⁸ France, the United Kingdom, and the United States are among the SEATO and Pacific Charter members.²⁸⁹

The Second Balkan Pact, signed in 1954,²⁹⁰ served as a partial successor to the 1933 Little Entente;²⁹¹ however, its effective life lasted only a couple of years.²⁹² Like its predecessor, the Pact pledged not only consultation but "immediate . . ." collective defense against "armed aggression," invoking article 51 of the Charter.²⁹³ Thus, if Pact parties had asserted individual claims to anticipatory self-defense, they would have incorporated those claims by joining the Pact.²⁹⁴

In 1955, some Arab League members signed the Baghdad Pact.²⁹⁵ Article 1 declared: "Consistent with article 51 . . . Parties will co-operate

U.S.T. 81, 83-84, 209 U.N.T.S. 28, 30, 32 (SEATO Treaty). See also LESZEK BUSZYNSKI, *SEATO: THE FAILURE OF AN ALLIANCE STRATEGY* chs. 1-2 (1983); STARKE, *supra* note 219, at 221-26; George Modelski, *SEATO: Its Function and Organization*, in MODELSKI, *supra* note 284, at 8-45.

287. Pacific Charter, Sept. 8, 1954, 6 U.S.T. 91, 209 U.N.T.S. 23, 24.

288. BOWMAN & HARRIS, *supra* note 257, at 196; BUSZYNSKI, *supra* note 286, ch. 6.

289. See TIF, *supra* note 138, at 350.

290. Treaty of Alliance, Political Cooperation and Mutual Assistance, Aug. 9, 1954, 211 U.N.T.S. 239 [hereinafter Second Balkan Pact]. A cooperation and friendship treaty among Greece, Turkey and Yugoslavia had been signed a year later. See generally JOHN O. LATRIDES, *BALKAN TRIANGLE* (1968). See also J.A.S. GRENVILLE & BERNARD WASSERSTEIN, *THE MAJOR INTERNATIONAL TREATIES SINCE 1945*, at 390-91 (1987) [hereinafter GRENVILLE & WASSERSTEIN]; Gerhard Bebr, *Regional Organizations: A United Nations Problem*, 49 AM. J. INT'L L. 166, 182 (1955).

291. Little Entente, *supra* note 154.

292. By 1956, the arrangement was in ruins; by 1962, it was a dead letter. See generally Bebr, *supra* note 290, at 182; GRENVILLE & WASSERSTEIN, *supra* note 290, at 390-91; LATRIDES, *supra* note 290.

293. Second Balkan Pact, *supra* note 290.

294. The Parties' obligations under the Pact were subject to those owed to other alliances, for example, the North Atlantic Treaty, *supra* note 95 (delimiting the obligations of Greece or Turkey). The Pact required consultation among members for conflicts in these obligations. Compare Second Balkan Pact, *supra* note 290, arts. 2, 6-7, 10, 211 U.N.T.S. at 241-45, with Pact of Organisation of the Little Entente, *supra* note 154, arts. 10-11, 139 L.N.T.S. at 239. Whether consultation was prerequisite before action is debatable; a foreign minister for a party state said that consultation would not be an obstacle, since all joint plans had been prepared and would be applied when joint measures were decided. LATRIDES, *supra* note 290, at 139.

295. Pact for Mutual Co-operation, Feb. 24, 1955, 233 U.N.T.S. 199 [hereinafter Baghdad Pact]. Arab League members included Iran, Iraq (1955-59), Turkey, and the United Kingdom. For the origins and history of the Baghdad Pact, see ROYAL INSTITUTE OF INTERNATIONAL AFFAIRS, *THE BAGHDAD PACT: ORIGINS AND POLITICAL SETTING* (Feb. 1956); Brian Holden Reid, *The "Northern Tier" and the Baghdad Pact*, in *THE FOREIGN POLICY OF CHURCHILL'S PEACETIME ADMINISTRATION 1951-55*, at 159-74 (John W. Young ed., 1988); Margaret Muryani Manchester, *The Tangled Web: The Baghdad Pact, Eisenhower, and Arab Nationalism* chs. 1-3 (1994) (unpublished Ph.D. dissertation, Clark University) (on file with the Naval War College Library).

for their security and defence," perhaps through special agreements.²⁹⁶ Unlike the North Atlantic and other treaties, it did not provide for crisis consultation by an agreement to determine measures to take once the Pact became effective.²⁹⁷ A political failure, the Pact dissolved in 1979.²⁹⁸

In 1955, the USSR and its European satellites signed the now-defunct²⁹⁹ Warsaw Pact.³⁰⁰ Its article 4 paralleled the North Atlantic Treaty:³⁰¹

In the event of an armed attack in Europe on one or more of the . . . Parties . . . by any State or group of States, each . . . Party . . . shall, in the exercise of the right of individual or collective self-defence, in accordance with article 51 . . . , afford the State or States so attacked immediate assistance, individually and in agreement with the other . . . Parties . . . , by all the means it considers necessary, including . . . armed force. . . . Parties . . . shall consult together immediately concerning the joint measures necessary to restore and maintain international peace and security.

Measures taken under this article shall be reported to the Security Council in accordance with the . . . Charter. These measures shall be discontinued as soon as the . . . Council takes the necessary action to restore and maintain international peace and security.³⁰²

Pact parties also pledged to consult immediately to provide for joint defense and to maintain international peace and security if a member "consider[ed] that a threat of armed attack on one or more of the . . . Parties to the Treaty ha[d] arisen."³⁰³ Similarly, the North Atlantic Treaty provides for consultations if a party believes a member state's territorial integrity, political independence or security is threatened.³⁰⁴

Cold War era bilateral defense treaties also contained similar language acknowledging anticipatory collective self-defense. Three such treaties

296. Baghdad Pact, *supra* note 295, at 212. See also Declaration Respecting Baghdad Pact, July 28, 1958, ¶ 1, 9 U.S.T. 1077, 335 U.N.T.S. 205, 206 (declaring the parties' "determination to maintain their collective security and to resist aggression, direct or indirect.").

297. Although the agreement possessed no territorial limitation, confining the treaty to Arab League members effectively excluded all but the Middle East and Northern Africa. See Baghdad Pact, *supra* note 295, arts. 2, 5, 233, U.N.T.S. at 212-14.

298. The United States was a "de facto" member but not a Pact party. See Declaration Respecting the Baghdad Pact, *supra* note 296, at 197; Reid, *supra* note 295, at 159-80; Manchester, *supra* note 295, at 336-45.

299. Cf. Protocol, Mar. 31, 1991, in BOWMAN & HARRIS, *supra* note 257, at 196 (11th Cum. Supp. 1995).

300. Treaty of Friendship, Co-operation and Mutual Assistance, May 14, 1955, 219 U.N.T.S. 24 [hereinafter Warsaw Pact]. For analysis of origins and practice under the Warsaw Pact, see generally NEIL FODOR, THE WARSAW TREATY ORGANIZATION: A POLITICAL AND ORGANIZATIONAL ANALYSIS (1990); J.P. JAIN, DOCUMENTARY STUDY OF THE WARSAW PACT 1-39 (1973). For an overview of the Soviet system, including the Warsaw Pact, see Mark Kramer, *The Soviet Union and Eastern Europe: Spheres of Influence*, in WOODS, *supra* note 272, ch. 5.

301. Compare Warsaw Pact, *supra* note 300, with North Atlantic Treaty, *supra* note 95, arts. 5, 7, 63 Stat. at 2244, 34 U.N.T.S. at 246-48.

302. Warsaw Pact, *supra* note 300, art. 4, at 28.

303. *Id.* art. 3, at 28.

304. Compare Warsaw Pact, *supra* note 300, art. 3, at 28, with North Atlantic Treaty, *supra* note 95, art. 4, 63 Stat. at 2244, 34 U.N.T.S. at 246.

binding the United States are typical. The Philippines Mutual Defense Treaty declares that "[e]ach Party recognizes that an armed attack in the Pacific Area on either . . . Part[y] would be dangerous to its own peace and security and declares that it would act to meet the common dangers in accordance with its constitutional processes."³⁰⁵ In common with the multilateral treaties, the Philippines-U.S. agreement pledges reporting to the Security Council and ending defense measures when the Council takes "measures necessary to restore and maintain international peace and security."³⁰⁶ Armed attacks are deemed to include attacks on metropolitan territories of either state, island territories under their jurisdiction, or their armed forces, public vessels or aircraft in the Pacific.³⁰⁷ Like the multilaterals, the parties pledge to consult "whenever in the opinion of either of them the territorial integrity, political independence or security of either . . . is threatened by external armed attack in the Pacific."³⁰⁸ The agreements with Korea³⁰⁹ and Japan³¹⁰ have similar terms.

The USSR concluded bilateral agreements with its European satellites to defend against "aggression," sometimes naming Germany as the possible aggressor, or building on World War II arrangements. The Warsaw

305. Mutual Defense Treaty, Aug. 30, 1951, Phil.-U.S., art. 4, 3 U.S.T. 3947, 3950, 177 U.N.T.S. 133, 136 [hereinafter Philippines Defense Treaty].

306. *Id.*

307. *Id.* art. 5, 3 U.S.T. at 3950, 177 U.N.T.S. at 136.

308. *Id.* art. 3, at 136.

309. Mutual Defense Treaty, Oct. 1, 1953, Repub. of Korea-U.S., arts. 2-3, 5 U.S.T. 2368, 2372-73, 238 U.N.T.S. 199, 203-041. Cf. Philippines Defense Treaty, *supra* note 305, arts. 3-5, 3 U.S.T. at 3950, 177 U.N.T.S. at 136.

310. Treaty of Mutual Cooperation and Security, with Agreed Minute and Exchange of Notes, Jan. 19, 1960 Japan-U.S., [hereinafter Japan Defense Treaty], arts. 4-5, 11 U.S.T. 1632, 1634, 373 U.N.T.S. 179, 188. Cf. Philippines Defense Treaty, *supra* note 305, arts. 3-5, 11 U.S.T. at 3950, 177 U.N.T.S. at 136. The Japan Defense Treaty replaced Security Treaty, Sept. 8, 1951, Japan-U.S., 3 U.S.T. 3329, 136 U.N.T.S. 211. Japan has moved to a policy of offshore land, sea, and air defense from its earlier strategy of defense at the water's edge. This shift seems to mark a change to a more anticipatory self-defense mode. See generally Japan-United States, *Joint Statement on Review of Defense Cooperation Guidelines and Defense Cooperation Guidelines*, Sept. 23, 1997, reprinted in 36 I.L.M. 1621 (1997); PETER J. KATZENSTEIN, *CULTURAL NORMS AND NATIONAL SECURITY: POLICE AND MILITARY IN POSTWAR JAPAN* 132-38 (1996); Mike M. Mochizuki, *A New Bargain for a Stronger Alliance*, in *TOWARD A TRUE ALLIANCE: RESTRUCTURING U.S.-JAPAN SECURITY RELATIONS* ch. 1 (Mike M. Mochizuki ed., 1997). The Mutual Defense Treaty, Dec. 2, 1954, Repub. of China-U.S., with U.S. Reservations, arts. 4-5, 6 U.S.T. 433, 436, 248 U.N.T.S. 213, 215 included the same kind of terms as the Japan Defense Treaty; the United States, however, denounced it when it recognized the Peoples' Republic of China. See generally *Goldwater v. Carter*, 444 U.S. 996 (1979). See also GRENVILLE & WASSERSTEIN, *supra* note 290, at 109-13 (noting U.S. Senate reservations to the China treaty forbade U.S. action unless China was forced to fight in self-defense or territorial extension of the U.S. commitment without Senate approval). If the United States negotiated formal agreements with Persian Gulf states other than Kuwait after Iraq's invasion of Kuwait in 1990, these bilateral treaties may provide for anticipatory collective self-defense. The Kuwait-U.S. agreement was a reactive defense treaty, since it had been invaded by the time the United States negotiated with Kuwait. These treaties have not been and may never be published for national security reasons. See George K. Walker, *The Crisis Over Kuwait, August 1990-February 1991*, 1991 DUKE J. COMP. & INT'L L. 25, 29-30. See also *RESTATEMENT (THIRD)*, *supra* note 62, § 312 r.n.5; *supra* note 62 and accompanying text.

Pact was not intended to supersede these treaties.³¹¹ Similarly, Britain and France ratified the Treaty of Dunkirk (1947)³¹² before the WEU was formed.³¹³ The Treaty says it was designed to prevent Germany from becoming a "menace to the peace" again and, like the abortive Versailles bilateral agreements, promised mutual support if Germany committed aggression.³¹⁴ Depending on the definition of aggression,³¹⁵ the plain language of these agreements supports a view that they contemplated anticipatory and reactive self-defense, despite some states' policy of reactive self-defense.

Without exception, these agreements require consultation when there is a threat to a party's territorial integrity, political independence, security or the like. Except for the ANZUS Pact,³¹⁶ these agreements say that an armed attack on one party is an attack on all. All refer to Charter requirements of reporting to the Security Council.

Do these terms leave room for anticipatory collective self-defense as a response to a threat? Under a restrictive view of self-defense, that a target state must await the first blow,³¹⁷ article 51 allows response by State A after State B, with whom State A has a mutual self-defense treaty, has been

311. See, e.g., Treaty of Friendship and Mutual Assistance, Mar. 18, 1948, Bulg.-USSR, art. 2, 48 U.N.T.S. 135, 144 [hereinafter Bulgaria Treaty].

If either party is involved in hostilities with Germany which might seek to renew its policy of aggression or with any other State . . . associated with Germany in a policy of aggression either directly or indirectly or in any other way, the other . . . shall immediately extend to the . . . Party involved in hostilities military and other assistance with all the means at its disposal[, subject to the Charter].

Id. Treaty of Friendship, Mutual Assistance and Cooperation, June 12, 1964, G.D.R.-USSR, art. 5, 3 I.L.M. 754, 756 (1965); (treaty subject to Warsaw Pact, *supra* note 300). See also FODOR, *supra* note 300, at 5-6, 188-91; GRENVILLE & WASSERSTEIN, *supra* note 290, at 185; JAIN, *supra* note 300, at 13-14; Bowett, *Collective Self-Defence*, *supra* note 209, at 144; W.W. Kulski, *The Soviet System of Collective Security Compared with the Western System*, 44 AM. J. INT'L L. 453 (1950). The Treaty of Friendship, Alliance and Mutual Assistance, Feb. 14, 1950, P.R.C.-USSR, art. 1, 226 U.N.T.S. 3, 12-14, had language like the Bulgaria Treaty, *supra*, but saw Japan as the potential adversary. See also GRENVILLE & WASSERSTEIN, *supra* note 290, at 158-59. USSR satellites also negotiated agreements among themselves, subject to the Warsaw Pact, *supra* note 300. See, e.g., Treaty on Friendship, Cooperation and Mutual Assistance, Apr. 5, 1967, G.D.R.-Pol., arts. 4-5, 6 I.L.M. 514 (1968).

312. Treaty of Dunkirk, *supra* note 74, 9 U.N.T.S. 187.

313. WEU Treaty, *supra* note 263, 19 U.N.T.S. 51.

314. Treaty of Dunkirk, *supra* note 74, preamble, arts. 1-2, 9 U.N.T.S. at 188-92 (predecessor to the WEU Treaty, *supra* note 263). See also COOK, *supra* note 74, at 75, 114, 116, 122, 259-60; GROSSER, *supra* note 272, at 84-85; *supra* notes 275-81 and accompanying text. Countries part of Western alliance systems concluded agreements, too; some seem to contemplate only reactive self-defense obligations. See, e.g., Alliance Treaty, July 29, 1953, Libya-U.K., arts. 2-3, 186 U.N.T.S. 185, 192 (requiring consultation for an "imminent menace of hostilities"; also describing troop basing rights). Nonaligned states negotiated bilateral agreements. See, e.g., Defense Agreement, May 30, 1967, United Arab Rep.-Jordan, art. 1, 6 I.L.M. 516 (1968) (including collective defense against "armed aggression"). See also GRENVILLE & WASSERSTEIN, *supra* note 290, at 348, 361.

315. See generally Walker, *Maritime Neutrality*, *supra* note 171, at 131-40.

316. ANZUS Pact, *supra* note 219.

317. See *supra* notes 1-4 and accompanying text.

attacked. Assuming there is a right of anticipatory self-defense,³¹⁸ State B could respond before receiving the first blow, subject to necessity and proportionality principles.³¹⁹ The remaining question is whether State A, which has not been attacked, could respond to an attack on State B and successfully claim anticipatory collective self-defense.

For reasons grounded in Charter law, the language of the collective self-defense treaties themselves, the history of collective self-defense agreement negotiations, and the practical realities of modern methods of warfare,³²⁰ there is a right to anticipatory collective self-defense in the Charter era. If consultation must occur before a self-defense response, as most agreements require,³²¹ nothing in the agreements forbids consultation before the first blow is struck. Oppenheim points out "[t]he right of Members of the United Nations to prepare in advance for collective defence is implicit in their right to have recourse to collective defence."³²² Since a right to collective self-defense is a customary norm in terms of the treaties and practice before the Charter,³²³ it is implicit in that customary right as well. Consultation or planning can include measures to be taken in anticipatory collective self-defense. The Charter does not forbid planning for individual or collective self-defense, regardless of whether the response be reactive or anticipatory in nature.

Article 51 of the Charter, a treaty that has its first and primary principle and purpose as the maintenance of "international peace and security,"³²⁴ lists the alternative rights of individual or collective self-defense.

318. See *supra* note 1 and accompanying text.

319. See *supra* notes 1-2 and accompanying text.

320. See McCORMACK, *supra* note 1, at 131; Mullerson & Scheffer, *supra* note 1, at 110-11. See 2 O'CONNELL, *supra* note 4, at 1101; O'CONNELL, *supra* note 1, at 3. Recognizing this over two decades earlier, O'Connell had concluded, however, that navies were coming to a reactive view of self-defense. See *id.* at 83, 171. But see 2 O'CONNELL, *supra* note 4, at 1101 (suggesting that the author would hold a different view today). See also *supra* note 4 and accompanying text.

321. See, e.g., *supra* notes 205, 237 and accompanying text. The principal exception appears to be the now defunct Baghdad Pact, *supra* note 295. See also *supra* notes 295-98 and accompanying text.

322. 2 OPPENHEIM, *supra* note 1, § 52aa, at 157.

323. See *supra* notes 140-42, 242-45 and accompanying text. In fact, most states are U.N. Members today. A customary collective self-defense right, however, may be claimed if the Charter does not apply. See generally *Nicaragua Case*, *supra* note 1; *supra* notes 137, 212 and accompanying text.

324. U.N. CHARTER art. 1(1). See also GOODRICH ET AL., *supra* note 5, at 25-26, citing *Certain Expenses of the United Nations*, 1962 I.C.J. 151, 213-15 (sep. opin. of Fitzmaurice, J.); LOUIS B. SOHN, *BROADENING THE ROLE OF THE UNITED NATIONS IN PREVENTING, MITIGATING OR ENDING INTERNATIONAL OR INTERNAL CONFLICTS THAT THREATEN INTERNATIONAL PEACE AND SECURITY* 5-6 (Int'l R. of L. Center Occasional Papers, 2d Ser., No. 1, 1997) (stating Charter drafters felt that the United Nations' "first purpose" was maintaining international peace and security). Reference in Art. 1(1) to the maintenance of international peace and security through collective measures has meant collective security through the U.N. system. See GOODRICH ET AL., *supra*, at 51-52; SIMMA, *supra* note 1, at 51-52. A right of collective self-defense is not inconsistent with or subordinate to Art. 1(1)'s declaration that states should seek dispute resolution through collective measures within the U.N. system, for instance, through Security Council action. U.N. CHARTER art. 1(1). Article 51 of the Charter preserves an "inherent right of . . . collective self-defence"

The same conditions applying to individual self-defense — necessity and proportionality — apply to collective self-defense.³²⁵ Thus, a right of collective self-defense is coterminous with a right of individual self-defense. Likewise, if individual self-defense includes anticipatory self-defense as commentators and states argue,³²⁶ collective self-defense includes that option too.

Given the history of negotiations contemporaneous with the Charter from the Act of Chapultepec³²⁷ and running through the Rio Treaty (1947), the WEU Treaty (1948), the North Atlantic Treaty (1949), the Arab League Joint Defense Treaty (1950), and more recent agreements, there is evidence in the language of the agreements themselves, particularly with respect to consultations to deter aggression, including armed aggression,³²⁸ to support a view that negotiators had anticipatory self-defense in mind. When the Charter's recognition of sovereignty is combined with the "inherent" right of self-defense and the supremacy of Charter law over inconsistent treaties,³²⁹ parties could not contract away an inherent right of self-defense, including collective self-defense, guaranteed by the Charter. And because the Charter negotiators operated against a background of prior treaty law, practice, judicial opinions and commentators' views supporting a right of anticipatory self-defense, that right in the collective self-defense context carried forward into the Charter era.

B. The Temporal Problem: When Does Liability Accrue?

Convictions at Nuremberg were based on what defendants knew, or should have known, when they decided to invade other states.³³⁰ Since then there have been no authoritative statements on whether liability accrues based on what decision makers know, or should know, when a reactive or anticipatory self-defense response is contemplated. Commentators have been tempted to justify opinions, at least in part, on evidence available after a decision, perhaps even years later.³³¹

until the Council acts. This is buttressed by the continuing vitality of the principle of national sovereignty, also stated in the Charter. U.N. CHARTER art. 51. See generally U.N. CHARTER art. 2(1); S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 4, 18; U.N. Secretary-General, *An Agenda for Peace: Report of the Secretary-General on the Work of the Organization*, U.N. Doc. A/47/277, S/24111 (1992), reprinted in 31 I.L.M. 956, 959 (1992); MICHAEL AKEHURST, *A MODERN INTRODUCTION TO INTERNATIONAL LAW* 21-23 (Brian Chapman ed., 3d ed. 1977); BRIERLY, *supra* note 209, at 45-49; SCHACHTER, *supra* note 1, at 9-15; Boutros Boutros-Ghali, *Empowering the United Nations*, 89 FOREIGN AFF. 98-99 (1992); Charney, *supra* note 231, at 530. But see HENKIN, *supra* note 1, at 9-10.

325. SCHACHTER, *supra* note 1, at 401.

326. See *supra* notes 1-2 and accompanying text.

327. See *supra* notes 204-07 and accompanying text.

328. See, e.g., *supra* notes 262-63 and accompanying text.

329. U.N. CHARTER arts. 2(1), 51, 103. See also *supra* notes 137, 212 and accompanying text.

330. See *supra* note 239 and accompanying text.

331. E.g., ALEXANDROV, *supra* note 1, at 162-63, appears to support his view that the 1981 Israeli raid on the Iraqi nuclear reactor could not be supported by self-defense because of the 1994 debate on imposing sanctions on North Korea, rather than using force, due to the danger of nuclear weapons. McCORMACK, *supra* note 1, at 98-99,

The developing law for *jus in bello* confirms that the proper time for predicating liability is what decision-makers knew, or should have known, when an operation was authorized. While the hindsight of a judicial examination can be 20/20, decisions at the time may be clouded with the fog of war.³³²

Declarations of understanding³³³ of four countries party to the 1977 Protocol I³³⁴ to the Geneva Conventions of 1949³³⁵ state that for protec-

derides the claim that the fact that Israel had been given a necessary guarantee of security under the U.S. "Star Wars" program was a reason why it may not have been necessary for Israel to bomb the reactor.

332. See VON CLAUSEWITZ, *supra* note 136, at 117-21.

333. The RESTATEMENT analyzes declarations and understandings:

When signing or adhering to an international agreement, a state may make a unilateral declaration that does not purport to be a reservation. Whatever it is called, it constitutes a reservation in fact if it purports to exclude, limit, or modify the state's legal obligation. Sometimes, however, a declaration purports to be an "understanding," an interpretation of the agreement in a particular respect. Such an interpretive declaration is not a reservation if it reflects the accepted view of the agreement. But another . . . party may challenge the expressed understanding, treating it as a reservation which it is not prepared to accept.

[For] a multilateral agreement, a declaration of understanding may have complex consequences. If it is acceptable to all . . . , they need only acquiesce. If, however, some . . . share or accept the understanding but others do not, there may be a dispute as to what the agreement means, and whether the declaration is in effect a reservation. In the absence of an authoritative means for resolving that dispute, the declaration, even if treated as a reservation, might create an agreement at least between the declaring state and those who agree with that understanding. [Restatement (Third), *supra*, § 313(2)(c), dealing with reservations] However, some . . . parties may treat it as a reservation and object to it as such, and there will remain a dispute between the two groups as to what the agreement means.

RESTATEMENT (THIRD), *supra* note 62, § 313 cmt. b. See also ILC Rep., *supra* note 224, at 189-90; Bowett, *Reservations*, *supra* note 149, at 69; *supra* note 149 and accompanying text (analyzing reservations).

334. Protocol Additional to Geneva Conventions of 12 August 1949, and Relating to Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I]. Although the United States is likely to ratify Protocol Additional to Geneva Conventions of 12 August 1949, and Relating to Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Protocol II], the Reagan Administration expressed serious reservations concerning Protocol I, and did not seek Senate advice and consent for it. Letter of Transmittal from President Reagan to the U.S. Senate (Jan. 29, 1987); Letter of Submittal from Secretary of State George P. Schultz to President Reagan (Dec. 13, 1986), in Message from the President of the United States Transmitting the Protocol II Additional to the Geneva Conventions of 1949, and Relating to the Protection of Victims of Noninternational Armed Conflicts, Concluded at Geneva on June 10, 1977, S. TREATY DOC. NO. 100-2, 100th Cong., 1st Sess. (1987), reprinted in 26 I.L.M. 561 (1987).

335. Convention for Amelioration of Condition of Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Convention for Amelioration of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Convention Relative to Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Convention Relative to Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Convention IV].

tion of civilians,³³⁶ protection of civilian objects,³³⁷ and precautions to be

336. Protocol I, *supra* note 334, art. 51, 1125 U.N.T.S. at 26. Article 51(2) and 51(5) prohibitions on attacks on civilians, absent other considerations (for example, civilians who take up arms), restate customary law. MICHAEL BOTHE ET AL., *NEW RULES FOR VICTIMS OF ARMED CONFLICT* 299 & n.3 (1982); DEPARTMENT OF THE AIR FORCE, *INTERNATIONAL LAW — THE CONDUCT OF ARMED CONFLICT AND AIR OPERATIONS*: AFP 110-31 ch. 14 (1976); SAN REMO MANUAL, *supra* note 5, ¶ 39, at 15; NWP 1-14, *supra* note 1, ¶¶ 6.2.3.2, 11.2 n.3, 11.3 (noting protections also under Convention IV, *supra* note 335, art. 33, 6 U.S.T. at 3538, 75 U.N.T.S. at 310); NWP 9A, *supra* note 1, ¶¶ 6.2.3.2, 11.2 n.3, 11.3 (same); 4 JEAN S. PICTET, *THE GENEVA CONVENTIONS OF 12 AUGUST 1949*, at 224-29 (1952); STONE, *LEGAL CONTROLS*, *supra* note 218, at 684-732; Michael J. Matheson, *Remarks, in Session One: The United States' Position on the Relation of Customary International Law to the 1977 Protocols Additional to the Geneva Conventions*, in Symposium, *The Sixth Annual American Red Cross — Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U. J. INT'L L. & POL. 419, 423, 426 (1987); William G. Schmidt, *The Protection of Victims of International Armed Conflicts: Protocol I Additional to the Geneva Conventions*, 24 AIR FORCE L. REV. 189, 225-32 (1984); Waldemar A. Solf, *Protection of Civilians Against the Effects of Hostilities Under Customary International Law and Under Protocol I*, 1 AM U. J. INT'L L. & POL. 117, 130-31 (1986). Civilians may not be used as human shields, nor may they be a subject of attacks intended to terrorize them, although otherwise legitimate attacks that happen to terrorize them are permissible. Specific intent to terrorize gives rise to liability. NWP 9A, *supra* note 1, ¶¶ 11.2, 11.3 (noting protections under Convention IV, *supra*, arts. 28, 33, 6 U.S.T. at 3538-40, 75 U.N.T.S. at 308-10); Hans-Peter Gasser, *Prohibition of Terrorist Attacks in International Humanitarian Law*, 1985 INT'L REV. RED CROSS 200 (1985); Commission of Jurists to Consider and Report Upon Revision of Rules of Air Warfare, *Hague Rules for Aerial Warfare*, art. 22, reprinted in RONZITTI, *supra* note 163, at 385; Matheson, *supra*, at 426; Schmidt, *supra*, at 227. Rules of distinction, necessity, and proportionality, with concomitant risk of collateral damage inherent in any attack that are stated in article 51, generally restate custom. BOTHE ET AL., *supra*, at 309-11, 359-67; FRITS KALSHOVEN, *CONSTRAINTS ON THE WAGING OF WAR* 99-100 (1987); McDUGAL & FELICIANO, *supra* note 1, at 525; NWP 9A, *supra* note 1, ¶¶ 5.2 & n.6, 8.1.2.1; SAN REMO MANUAL, *supra* note 5, ¶¶ 39-42 & Commentaries; STONE, *LEGAL CONTROLS*, *supra* note 218, at 352-53; W.J. Fenrick, *The Rule of Proportionality and Protocol I in Conventional Warfare*, 98 MIL. L. REV. 91, 125 (1982) (questioning whether proportionality is an accepted customary norm); Matheson, *supra*, at 426; *Results of the First Meeting of the Madrid Plan of Action Held in Bochum, F.R.G., November 1989*, 7 BOCHUMER SCHRIFTEN ZUR FRIEDENSSICHERUNG UND ZUM HUMANITÄREN VOLKERRECHT 170-71 (1991); Schmidt, *supra*, at 233-38; Solf, *supra*, at 131; G.J.F. van Hegelsom, *Methods and Means of Combat in Naval Warfare*, in 8 BOCHUMER SCHRIFTEN ZUR FRIEDENSSICHERUNG UND ZUM HUMANITÄREN VOLKERRECHT 1, 18-19 (1992).

337. Protocol I, *supra* note 334, art. 52, 1125 U.N.T.S. at 26. Article 52 states a general customary norm, except for its prohibition on reprisals against civilians in article 52(1), for which there are divergent views. See generally BOTHE ET AL., *supra* note 336, at 320-27; COLOMBOS, *supra* note 163, §§ 510-11, 524-25, 528-29, at 501-04; NWP 1-14, *supra* note 1, ¶¶ 6.2.3 & n.36, 6.2.3.2 (noting protections for some civilians from reprisals under Fourth Convention, *supra* note 336, art. 33, 6 U.S.T. at 3538, 75 U.N.T.S. at 308-10), 8.1.1 & n.9, 8.1.2 & n.12 (noting U.S. position that Protocol I, *supra*, art. 52[1], 1125 U.N.T.S. at 27, "creates new law"); NWP 9A, *supra* note 1, ¶¶ 6.2.3 & n.33, 6.2.3.2, 8.1.1 & n.9, 8.1.2 & n.12 (same); 2 O'CONNELL, *supra* note 4, at 1105-06; 4 PICTET, *supra* note 336, at 131; CLAUD PILLOUD, *COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949*, ¶¶ 1994-2038, at 630-38 (Yves Sandoz et al. eds., 1987); Matheson, *supra* note 336, at 426; Solf, *supra* note 336, at 131. But see Frank Russo, Jr., *Targeting Theory in the Law of Naval Warfare*, 30 NAV. L. REV. 1, 17 n.36 (1992) (rejecting application of Protocol I, *supra* note 334, art. 52(2), 1125 U.N.T.S. at 27, to naval warfare).

taken in attacks,³³⁸ a commander should be liable based on that commander's assessment of information available at the relevant time, when the decision is made.³³⁹ Two of the 1980 Conventional Weapons Convention's³⁴⁰ protocols have similar terms, stating that a commander is only bound by information available when a decision to attack is made.³⁴¹

Protocol I, with its understandings, and the Conventional Weapons

338. Protocol I, *supra* note 334, art. 57, 1125 U.N.T.S. at 29. Rules of distinction, necessity and proportionality, with the concomitant risk of collateral damage inherent in any attack, in article 51 are generally restatements of customary norms. *See generally* BOTHE ET AL., *supra* note 336, at 309-11; KALSHOVEN, *supra* note 336, at 99-100; McDougal & Feliciano, *supra* note 1, at 525; SAN REMO MANUAL, *supra* note 5, ¶¶ 39-42 & Commentaries; STONE, LEGAL CONTROLS, *supra* note 218, at 352-53; Fenrick, *supra* note 336, at 125 (questioning whether proportionality is accepted as a customary norm); Matheson, *supra* note 336, at 426; Results, *supra* note 336, at 170-71; Schmidt, *supra* note 336, at 233-38; Solf, *supra* note 336, at 131; van Hegelsom, *supra* note 336, at 18-19.

339. Declaration of Belgium, May 20, 1986, *reprinted in* SCHINDLER & TOMAN, *supra* note 244, at 706, 707; Declaration of Italy, Feb. 27, 1986, *reprinted in* SCHINDLER & TOMAN, *supra* note 244, at 712; Declaration of the Netherlands, June 26, 1977, *reprinted in* SCHINDLER & TOMAN, *supra* note 244, at 713, 714; Declaration of the United Kingdom, Dec. 12, 1977, *reprinted in* SCHINDLER & TOMAN, *supra* note 244, at 717.

340. Convention on Prohibitions or Restrictions on Use of Certain Conventional Weapons Which May Be Deemed Excessively Injurious or to Have Indiscriminate Effects, Oct. 10, 1980, T.I.A.S., 1342 U.N.T.S. 137 [hereinafter Conventional Weapons Convention].

341. Conventional Weapons Convention, *supra* note 340; Protocol on Prohibitions or Restrictions on Use of Mines, Booby Traps and Other Devices [hereinafter Protocol II], Oct. 10, 1980, art. 2(4), 1342 U.N.T.S. 168, as amended, May 3, 1996, art. 2(6), 35 I.L.M. 1206, 1209 (1996) [hereinafter Amended Protocol II]; Protocol on Prohibitions or Restrictions on Use of Incendiary Weapons [hereinafter Protocol III], Oct. 10, 1980, art. 1(3), 1342 U.N.T.S. 171, 172. The United States has ratified the Convention and Protocols I and II, Protocol III is not in force for the United States. TIF, *supra* note 138, at 454. However, Amended Protocol II, Protocol III and Protocol IV on Blinding Laser Weapons, May 3, 1995, 35 I.L.M. 1218 (1996) are now before the U.S. Senate. Marian Nash Leich, *Contemporary Practice of the United States Relating to International Law*, 91 AM. J. INT'L L. 325 (1997). Protocol IV and Protocol on Non-Detectable Fragments (Protocol I), Oct. 10, 1980, 1342 U.N.T.S. 168, do not have these provisions. Protocol II and III commentators say little about these provisions; they state the obvious. *See* Burrus M. Carnahan, *The Law of Land Warfare: Protocol II to the United Nations Convention on Certain Conventional Weapons*, 105 MIL. L. REV. 73 (1984); W.J. Fenrick, Comment, *New Developments in the Law Concerning the Use of Conventional Weapons in Armed Conflict*, 19 CAN. Y.B. INT'L L. 229 (1981); Howard S. Levie, *Prohibitions and Restrictions on the Use of Conventional Weapons*, 68 ST. JOHN'S L. REV. 643 (1994); J. Ashley Roach, *Certain Conventional Weapons Convention: Arms Control or Humanitarian Law?*, 105 MIL. L. REV. 3 (1984); William G. Schmidt, *The Conventional Weapons Convention: Implications for the American Soldier*, 24 A.F.L. REV. 279 (1984). The United States declared it would not sign Convention on Prohibition of Use, Stockpiling, Production and Transfer of Anti-personnel Mines and on Their Destruction, Sept. 18, 1997, 36 I.L.M. 1507 (1997). *See generally* President William J. Clinton, *Remarks on Landmines and an Exchange with Reporters*, 33 WEEKLY COMP. PRES. DOC. 1356-59 (Sept. 22, 1997). Nonetheless, action by other states indicates that the Convention will be in force soon. More recently, the Clinton Administration has pledged that the United States will sign the Convention by 2006, but only if the Pentagon comes up with an alternate weapon, particularly for land mines in place in Korea. Steven Lee Myers, *Clinton Agrees to Land-Mine Ban, but Not Yet*, N.Y. TIMES, May 22, 1998, at A3.

Convention protocols are on their way to acceptance among states.³⁴² These treaties' common statement, in text or related declarations, that commanders will be held accountable based on information they have at the time for determining whether attacks are necessary and proportional has become a nearly universal norm. The *San Remo Manual* recognizes it as the standard for naval warfare.³⁴³ It can be said with fair confidence that this is the customary standard for *jus in bello*. It should be the standard for *jus ad bello*. A national leader directing a self-defense response, whether reactive or anticipatory, should be held to the same standard as a commander in the field making decisions about attacks. A national leader should be held accountable for what he or she, or those reporting to the leader, knew or reasonably should have known, when a decision is made to respond in self-defense.

V. Conclusions and Projections for the Future

After the Congress of Vienna attempted to impose order on post-Napoleonic Europe, countries great and small tried to preserve peace and promote national security interests through collective security systems. Some arrangements have been general, such as the alliance system after Waterloo. Others have been regional, for example, the treaties negotiated during the Crimean War. Many have been bilateral. Although many had terms stating a reactive self-defense theory, others provided for anticipatory self-defense. Practice of those times reveals use of informal arrangements as well.³⁴⁴

The new factor that emerged after the Franco-Prussian War was defensive alliance systems, often in secret treaties, which could promote aggressive coalition warfare but which provided for reactive and anticipatory collective self-defense. Arrayed against these alliances were bilateral and multilateral agreements that also utilized reactive and anticipatory collective self-defense.³⁴⁵

The Treaty of Versailles and other agreements ending World War I established the League of Nations. The Covenant of the League, Part I of the postwar peace treaties, did not address self-defense directly, although the Covenant can be read as not excluding self-defense, including anticipatory self-defense. The Pact of Paris and its reservation through diplomatic notes, while outlawing aggressive war as national policy, preserved an inherent right of self-defense. Based on the treaty record before the Great

342. *Recent Actions Regarding Treaties to Which the United States Is Not a Party*, 35 I.L.M. 1339 (1996) lists 145 states party to Protocol I, *supra* note 334. The United States is not a party. TIF, *supra* note 138, at 454, listed 63 states for Conventional Weapons Convention, *supra* note 288. Most are parties to Protocols II and III, *supra* note 341.

343. *SAN REMO MANUAL*, *supra* note 5, ¶ 46(b), at 16 & Commentary 46.3. *See also* BEN CHENG, *GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS* 90 (1983); DINSTEIN, *supra* note 1, at 191; MCDUGAL & FELICIANO, *supra* note 1, at 220.

344. *See supra* notes 18, 42-44 and accompanying text.

345. *See supra* Part I.B.

War, this inherent right included anticipatory collective self-defense as an option for preserving international peace and security. The Nyon Arrangement and practice under it, other international agreements, the *Budapest Articles*, and international military tribunal decisions after World War II confirmed continuation of a right of anticipatory collective self-defense. There is also evidence that more informal arrangements could be concluded.³⁴⁶

Thus, in 1945, when the Charter provided, through article 51, for an inherent right of individual and collective self-defense in the context of the contemporary Act of Chapultepec, the right that the Charter negotiators intended as inherent included a right of anticipatory collective self-defense.³⁴⁷ The record of multilateral treaties, bilateral agreements and state practice since 1945 confirms that right, the content of which includes a right to conclude more informal arrangements. And while prior consultation may be a customary prerequisite to exercise of that right, consultation may include prior planning, including planning for anticipatory responses. There is nothing in the *Caroline Case* to forbid such a response.³⁴⁸ The inherent right to anticipatory collective self-defense, including the right to engage in more informal arrangements, continues today as it has existed since the Congress of Vienna. States can no longer adopt war as an instrument of national policy, but beyond that limitation, a right to self-defense, anticipatory or reactive, individual or collective, continues as before.³⁴⁹

Anticipatory collective self-defense, like unilateral anticipatory self-defense, is always tempered by necessity and proportionality principles. Nevertheless, the treaty record since 1815, although tortured, occasionally obscurely phrased, and sometimes muffled through secret treaties or reservations that are not part of published agreements, demonstrates that international law has recognized, and continues to recognize, a right of anticipatory collective self-defense. If confidence and participation in the U.N. system through affirmative Security Council action continues, it is likely that there will be more, not less, use of anticipatory responses,³⁵⁰ followed by Council decisions³⁵¹ on further methods to contain threats to the peace, breaches of the peace, threats to states' territorial integrity, aggression, or invasion. One issue that should be resolved in the future is the temporal problem. States and their leadership should be held to what they knew, or should have known, when a decision for anticipatory collective response was taken.

346. See *supra* notes 219, 245 and accompanying text.

347. See *supra* Part III.

348. See *supra* note 26 and accompanying text.

349. See *supra* Part IV.A.

350. Cf. Lowe, *supra* note 1, at 128.

351. U.N. CHARTER arts. 25, 48. See also SYDNEY D. BAILEY, *THE PROCEDURE OF THE UN SECURITY COUNCIL* 235-46 (2d ed. 1988); JORGE CASTENEDA, *LEGAL EFFECTS OF UNITED NATIONS RESOLUTIONS 71-75* (1969); GOODRICH ET AL., *supra* note 5, at 207-11, 334; SIMMA, *supra* note 1, at 410-15, 652; W. Michael Reisman, *The Constitutional Crisis in the United Nations*, 87 AM. J. INT'L L. 83, 87 (1993).

Some multilateral self-defense treaties negotiated since World War II have been abrogated (the Warsaw Pact³⁵²) or have fallen into desuetude (SEATO³⁵³). Others, such as the Rio³⁵⁴ and North Atlantic³⁵⁵ treaties, remain in force. Bilateral agreements have come and gone.³⁵⁶ The surviving agreements' roles may be changing.³⁵⁷ New agreements, or perhaps informal arrangements,³⁵⁸ may be negotiated. What role anticipatory collective self-defense may play in these evolving developments is not clear. However, the terms of prior agreements, negotiated before and after 1945, and state practice, show that it would be appropriate, as a matter of international law, to include anticipatory self-defense as a response option until the Council acts pursuant to article 51. How anticipatory collective self-defense as a peremptory norm (*jus cogens*) fits into this analysis, if at all, remains an inquiry for the future.³⁵⁹

352. See *supra* notes 299-304 and accompanying text.

353. See *supra* notes 286-89 and accompanying text.

354. See *supra* notes 255-62 and accompanying text.

355. See *supra* notes 270-72 and accompanying text.

356. For example, in the case of the United States, its arrangement with the Republic of China, i.e., the government of Taiwan, was ended by denunciation. The trilateral ANZUS Pact, *supra* note 219, has been suspended with respect to New Zealand. U.S. bilateral treaties with Japan, the Philippines, and South Korea remain in full force, however. See *supra* notes 278-85, 305-10 and accompanying text.

357. Compare, e.g., Raymond Ausmus et al., *Building a New NATO*, FOREIGN AFF., Sept.-Oct. 1993, at 28, and Colin L. Powell, *U.S. Forces: Challenges Ahead*, FOREIGN AFF., Winter 1992, at 32, 42, with Owen Harries, *The Collapse of "The West,"* FOREIGN AFF., Sept.-Oct. 1993, at 41; see also MANDELBAUM, *supra* note 22; Albright, *supra* note 95; Perlmutter & Carpenter, *supra* note 95.

358. For example, the European Union, successor to the European Economic Community, has indicated a security role may be part of its agenda. See *supra* notes 220-21 and accompanying text. See also, e.g., *supra* note 175 and accompanying text.

359. See Kahgan, *supra* note 212. See also *supra* note 212 and accompanying text.